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Executive Military Power: A Path to American Dictatorship

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Comment

Executive Military Power: A Path to American Dictatorship

The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. THE FEDERALIST NO. 47, (J. Madison).

I. INTRODUCTION

"[Allison Krause] was weeping . . . from emotion of what was happening to her, her friends, and her campus. Troops with guns and bayonets sweeping through an American University. To Allison, this only happened in South America, and she was far from alone in her reaction to what seemed like a military invasion."[1]

Pictures taken at the Kent State disorder and used as evidence in the Davies Report showed Allison Krause alone and silhouetted against the sky. She was protesting the presence of the troops on the campus.[2] Other photographs showed that a platoon of men huddled briefly and then formed a line.[3] Testimony indicated that a pistol shot was fired by one of the National Guardsmen and the men pivoted to face the crowd of jeering students, raised their rifles with some dropping to one knee, and fired at least sixty-one shots into the crowd of students.[4] Some evidence suggested that the troops singled out as targets students who were obviously dissenting. Sandy Lee Scheuer was killed while running from one building to another to attend a class.[5] Allison Krause was shot in the back during a retreat.[6]

The purpose of this Comment is to examine the potential consequences of placing virtually unlimited power to use military forces

1. 117 CONG. REC. 26840, 26850 (1971) (Senator Moorhead introduces Kent State Report into the Record) [hereinafter cited as DAVIES REPORT]. This is a quotation from the testimony of "Barry," the boyfriend of Allison Krause, who witnessed her homicide during the Kent State disorder.
2. *Id.* at 26843, 26848, 26850.
3. *Id.* at 26848-49.
4. *Id.* at 26843, 26844-45, col. 2 to col. 3, 26843, col. 2.
5. *Id.* at 26850, 26852.
6. *Id.* at 26849.

domestically in the hands of the executive. Section II will analyze the distribution of this power among the legislative, executive and judicial branches of government. Section III will examine potential abuses of the present distribution of power, suggest alternatives, and describe a hypothetical result of the present concentration of power in the executive branch of the government.

II. THE ACCUMULATION OF POWER

Present legislative, executive and judicial standards relating to the use of military troops in civil disorders are ineffective in limiting the discretionary power of the chief executive. Legislation delegating power to the chief executive fails to limit his power sufficiently to comport with the language and intent of the Constitution. Further expansion of that delegated power by the executive branch in the face of weak, inconsistent and ambiguous judicial standards has resulted in *no* effective restraints on the chief executive. The most recent United States Supreme Court decision on executive domestic military power, *Scheuer v. Rhodes*,[7] has for the first time allowed judicial review of the executive's decision to deploy troops but it has not established guidelines to limit the President's discretion.

A. Constitutional and Legislative Foundations

Use of military force to combat domestic violence and insurrection can best be analyzed by reviewing and comparing the constitutional language and the intent of those drafting the Constitution with existing legislation.

1. Constitutional Provisions

The Constitution does not grant the President the power to use military force to suppress insurrections or to execute laws. A controversial issue at the time the Constitution was drafted was whether the federal government should be involved in this area at all, since each colony had traditionally settled civil disturbances with its own militia. The concept of a federal standing army used to settle riots was repulsive, but a strong source of power was necessary for an effective federal government. Sufficient power was surrendered to the federal government, but all expressions and implications placed the power in the hands of Congress, whose members were directly responsible to local interests, and consisted only of the power to use local militia called into federal service. Even this created much controversy during the ratification of the Constitution. As a result, article II of the Constitution does not give

7. 416 U.S. 232 (1974).

the President the express power as chief executive or as commander-in-chief to use military force in executing laws or suppressing *domestic* insurrections. Only Congress, under article I, section 8 of the Constitution, has the power to authorize federal use of the state militia in situations involving domestic violence, and even then the power is subject to state governmental control. The common law history behind the constitutional language illustrates that the omission of domestic military power from the presidential powers of article II was an intentional limitation on executive power.

The only constitutional provision authorizing the use of military force to protect against invasion and domestic violence is found in article I, section 8. Thus, the only force provided by the Constitution for suppression of an insurrection or domestic violence is the "militia."

a. Constitutional Language

A functional distinction between the "militia" as opposed to the "army" and "navy" is drawn in article I, section 8. It provides Congress with the power to establish laws and procedures for raising and calling forth the militia to execute the laws of the union, to suppress insurrections of persons within the union, or to repel invasions of foreign armies. Section 8 also authorizes Congress to provide laws for organizing, arming and disciplining the military and to provide for calling the militia into the service of the United States, as well as raising an army and navy, but not for the purpose of suppressing insurrections or executing laws. Thus, article I distinguishes "armies" and a "navy" as functionally distinct from a "militia" by specifying that only the local milita may be deployed domestically by concurrent federal and state power. Such federal power was not reserved to the federal government regarding the domestic use of the "army" and "navy." Consequently, the unreserved use of the "army" or "navy" would be beyond the scope of federal power under the tenth amendment as an interference with state police power.

Article IV, section 4 of the Constitution guarantees every state in the union "a republican form of government" and requires that they be protected against invasion and "on application of the Legislature or of the executive" (when the legislature cannot be convened) against domestic violence."[8]

The modern "militia" reserved to the states has been held in *Maryland v. United States*[9] to be the National Guard units as pro-

8. U.S. CONST. art. IV, § 4.
9. 381 U.S. 41 (1965). Definitions of the term "militia" vary. When used in statutory provisions, militia has been defined as "the class of state citizens who are subject to military duty." *Id.* at 47.

vided in the National Defense Act.[10] The governor retains command of each unit[11] unless they are called into active federal service.[12] The National Guard, though trained, equipped, structured and funded by the federal government, is subject to state control as a state militia.[13] The National Guard is currently distinguishable from regular troops on this basis. The constitutional language thus indicates that only the National Guard, and not regular troops, can be used to suppress insurrection. The Constitution also places the power for calling forth the militia primarily in the legislature, giving the executive this authority only when the legislature cannot be convened.[14]

b. Constitutional Intent and Common Law History

The constitutional language regulating the use of the military was not accidental or unintentional. The drafters were attempting to preserve local control of all law enforcement. In early English common law, a standing force of citizen soldiers was created to supplement the feudal army. This military unit, the forerunner of the National Guard, was called the *jurata ad arma*.[15] By the mid-fourteenth century, the Court of Constables and Marshalls was established with exclusive jurisdiction over the discipline of British armed-forces, both civilian and the regular armies, whenever they were led off to war.[16] When the *jurata ad arma* was used for domestic purposes, it was considered to be an extension of the sheriff and subject to the control of ordinary courts.[17] During the fifteenth century Law of the Star Chamber, miltary force in the Court of Constables and Marshalls was used effectively to abrogate due process rights.[18] As a result of the Law of Star Cham-

10. 32 U.S.C. § 104 (1970), which provided for the equipping and training of such units similar to the equipping and training of regular Army troops. The federal government funds these units, 32 U.S.C. §§ 106-08 (1970); *see also* discussion accompanying note 53 *infra.*
11. Maryland v. United States, 381 U.S. 41, 47 (1965). *See* 32 U.S.C. § 314 (1970).
12. 32 U.S.C § 317 (1970).
13. *See* 32 U.S.C. § 104 (1970). The National Guard is indirectly controlled by the executive branch of the federal government because failure to comply with federal directives will usually result in withdrawal of federal funds. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 497 (1968) [hereinafter cited as CIVIL DISORDERS]; *see also* discussion accompanying note 219 *infra.*
14. U.S. CONST. art. IV, § 4.
15. Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorder*, 57 IOWA L. REV. 1, 2-5 (1971); Note, 75 W. VA. L. REV. 143, 150 (1972).
16. *See* Engdahl, note 15 *supra* at 2-5; Note, *supra* note 15 at 151.
17. *Id.*
18. F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 260-70 (1908); *accord*, Note, *supra* note 15.

ber's actions, the restoration government declared the *jurata ad arma*, which had become known as the posse comitatus,[19] to be distinct from the militia which could be used only in time of actual war, insurrection, rebellion, or invasion. The *posse comitatus* was to be used to quell domestic disturbances, but only in accordance with due process of law.[20] Use of the military was reserved for actual warfare. Although historically the "militia" and the "posse" were the same, the militia was eventually viewed as the national army and separate from the civilian force or posse.[21]

The Riot Act of 1714 allowed use of the posse to assist regular local law enforcement officers such as the mayor and the sheriff in suppressing riots.[22] The posse, when used in this manner, remained subject to civilian due process standards and was under the control of local civilian authorities. These concepts of English common law were ignored in the American colonies,[23] and abuse of the principles underlying the posse comitatus was one of the factors leading to the American Revolution. The Declaration of Independence stated that the people of the several colonies declared that one of the grievances "impelling" them "to dissolve the political bond" connecting them to the British nation and justifying their withdrawal of allegiance from the British sovereign was that "[the king] had affected to render the military independant of and superior to civil power."[24]

The Constitution was founded upon the principles of government set forth in the Declaration of Independance.[25] During the ratification debates the populace had to be assured that the intended use of military force provided for in the Constitution was a domestic force similar to the *posse comitatus*; that is, that only the state militia would be used in instances of civil disorder, and that it would always be subordinate to civil government.[26] They feared

19. *See* Engdahl, *supra* note 15 at 16 n.2; Note, *supra* note 15 at 151.
20. *See* Note, *supra* note 15 at 151.
21. *See* Note, *supra* note 15 at 151 n.48. *Compare* Valdes v. Black, 446 F.2d 1071 (10th Cir. 1971) and discussion accompanying note 191 *infra*.
22. *See* Note, *supra* note 15 at 151.
23. One example of the misuse of the principle of the *posse comitatus* was the use of troops in the Boston Massacre where the soldiers were not subject to civilian law and authority. Engdahl, *A Comprehensive Study of the Use of Military Troops in Civil Disorders with Proposals for Legislative Reform*, 43 U. COLO. L. REV. 399, 400 n.9 (1972) [hereinafter cited as *Comprehensive Study*].
24. *Ex parte* Merryman, 17 F. Cas. 144, 152 (No. 9847) (C.C.D. Md. 1862).
25. *Id.*
26. THE FEDERALIST No. 8 at 44; No. 25 at 158; No. 26 at 164; No. 27 at 171; No. 29 at 181; No. 43 at 288 (J. Cooke ed. 1961) (A. Hamilton, J. Madison). Shay's Rebellion in January, 1787, illustrated the need for a force to deal with domestic disturbances. The Constitution gave Congress the power to establish laws for providing an army and a mil-

that by substituting federally controlled military power for a locally controlled force would subject them to martial law. Ever since the constitutional period, the definition of martial law has been the implementation of military power over civilians so civilians are subjected to military control.[27] Because armies are organized in a chain of command, when martial law is imposed, civilians are governed by a single military commander within the particular district.[28]

> When a citizen is governed by military power, he is not governed by the soldier's code of military law but is said to be governed by martial law. This law is perfectly distinct and entirely different from the military law to which the soldiers are subjected. When the military commander, as the agent of the king, president or governor, governs the citizens, he does not rule them by the code of military law enacted for soldiers but he governs the citizens by arbitrary will.[29]

> Martial law is the arbitrary law of the military ruler for governing citizens in a time of necessity; it is the law of force and war that depends upon the values of justice and power of the commanding leader. Though he does not make any laws by common consent of the legislature in time of exigency and its consequent necessity for restoring order, he has absolute power which makes his orders as enforcible as statutory law.[30]

Martial law is more than the mere presence of the Army. It is the supplantation of local civilian law and authority by the arbitrary discretion of a military commander possessing the potential for absolute destruction of all civil rights.[31]

This potential risk of martial law is the recognized danger that the drafters of the Constitution were attempting to avoid. Not

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itia, and when the first Congress met, one of their initial acts was to provide the means for protecting against civil disorders.

27. *See* Duncan v. Kahanamoku, 327 U.S. 304 (1943); Sterling v. Constantin, 287 U.S. 378 (1932); U.S. DEP'T OF THE ARMY, PAMPHLET No. 27-11, MILITARY ASSISTANCE TO CIVIL AUTHORITIES 6-8 (1966) [hereinafter cited as DoA PAMPHLET 27-11].
28. Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911). *Ex parte* Lavinder, 88 W. Va. 713, 108 S.E. 428 (1921).
29. Griffin v. Wilcox, 21 Ind. 370, 478 (1863).
30. *Id.* at 477.
31. Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959). The army objects to the contemporary use of the term "martial law" and favors the term "martial rule" on the basis that "martial law" is not law at all but rather supplantation of law with military force. "Martial rule" is defined as the temporary government of the population through the military forces as necessity may require. *See* Lectures on Martial Law prepared by the Judge Advocate General's School, Charlottesville, Virginia, 6 (1956). The effect is the same whichever term is adopted—a civilian government supported by a military force. Military law is distinguishable from all of these terms in that it governs acts of the military only while they are engaged in military service; W. BLACKSTONE, COMMENTARIES, 441-44.

only does the literal language of the Constitution suggest a distinction between using federal troops for war and state militias for domestic turmoil, but the common law history, the political controversies fueling the American Revolution, and the adoption of the United States Constitution also suggest that the founding fathers intended to limit the use of military force domestically to the use of a group of "civilian soldiers" acting as a locally controlled *posse comitatus*. From these historical foundations it can be concluded that the National Guard is to serve as the agent of local authorities in enforcing civilian laws. The guarantee clause, in article IV of the Constitution implies an obligation on the part of the federal government to provide for and deploy National Guardsmen, but not to remain in command or to use these troops domestically as a military force subject to military law or Pentagon control.[32]

It is very important to note that the Constitution does not grant, and the drafters did not intend it to grant, the power to suppress insurrections or execute laws through use of the militia to any one person. The power was expressly placed in the hands of Congress, and even then there was significant controversy during the ratification of the Constitution over whether the federal government should interfere in this area at all.[33]

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32. *See Comprehensive Study, supra* note 23 at 406. Some have asserted that the guarantee clause removed the right of the states to declare martial law and placed it with the federal government in the instance of domestic violence. Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942); *see* State *ex rel.* Mays v. Brown, 71 W. Va. 519, 77 S.E. 243 (1912).

33. Authors disagree about the amount of power that can be given to the President by implication. *See* Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MILITARY L. REV. 85 (1960) [hereinafter cited as Furman]; CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, 131 (4th ed. 1957) [hereinafter cited as CORWIN]. Although it had always been assumed that "United States" in the guarantee clause referred to Congress, as Chief Justice Taney stated in Luther v. Borden, 48 U.S. (7 How.) 1, 81 (1849), President Hayes introduced the concept that the chief executive was included in the term by furnishing arms and transferring troops without prior congressional approval. *See* CORWIN at 134. The issue is not whether the President can execute laws *or* command the military, but whether he can at his discretion execute laws *through* use of military troops, and whether he can direct military force against dissenting citizens without congressional approval. Though many opinions cited herein suggest that he has such implied power, fourteenth and fifteenth clauses U.S. CONST. art. I § 8 in combination with art. IV § 4 and with the intent at the time of its drafting, suggest that the President does not have such authority. Instances cited herein will also demonstrate some policy reasons for this interpretation. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952), the Court held that the President lacks the constitutional authority as commander in chief of

2. Legislation

The present legislation regarding the domestic use of military troops in civil disorders consists of chapter 15 of Title 10 of the United States Code, the National Guard Army Act,[34] and the Posse Comitatus Act.[35] This legislation creates a system far removed from the concept of a locally controlled *posse comitatus* consisting only of National Guard troops. Although the troops used *may* be only National Guard troops called into active federal service, the legislation does not require this. The troops are not subject to local authority but rather to executive orders exclusively. In fact, local control of troops is considered a federal crime under the Posse Comitatus Act.

a. Chapter Fifteen

Chapter fifteen of Title 10 of the United States Code represents a gradual erosion of the Posse Comitatus Doctrine through congressional delegation of more and more of its constitutional power to the executive. The effect has been to eliminate congressional authorization, investigation and ratification of presidential use of troops and to minimize congressional involvement in the use of military power.

The first section of this chapter illustrates the erosion of congressional involvement. Section 331 of Title 10 of the United States Code ("section 331") is a remnant of a statute initially enacted to limit the use of militia in civil disorders.[36] The present version of the statute eliminates any such limitation. Section 331 provides that in time of insurrection, the President is authorized to call a state's militia into federal service to aid other states upon the request of the state's legislature or its governor when the legislature cannot be convened. The state may request the number of outside troops it wishes to employ, but the troops remain under the control of the President to use as he considers necessary to suppress the insurrection. Up to the time of the Civil War, the statute depicted the militia as a unique military unit to be used only in instances of insurrection where all other efforts by local sheriffs, police, and federal marshalls were ineffective. Local ef-

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the armed forces to take possession of private property to stop a labor dispute. The congressional policy was to be executed in a manner prescribed by Congress, not the executive, and such law-making power of Congress was not to be subjected to presidential and military supervision, *Id.* at 588. *See* discussion accompanying notes 56-64 *infra.*

34. 10 U.S.C. § 3500 (1970).

35. 18 U.S.C. § 1385 (1970).

36. The 1807 amendment to the statute replaced all reference to militia to include the use of the regular standing Army. Act of March 3, 1807, ch. 39, 2 Stat. 443.

forts had to include the use of the posse comitatus or civilian soldiers to support law enforcement officers and aid in the execution of state or federal laws.[37]

Section 332 of Title 10 of the United States Code ("section 332") continued the expansion of presidential power by amending the test for using troops from use in a situation of necessity to use of troops in a situation where such use would be practical. Section 332, which was derived from the consolidation of separate provisions within earlier enactments of section 331,[38] was adopted to allow the President to use the state militia and federal troops for federal law enforcement.[39] Congress authorized the President to use military force to execute federal laws whenever he considers that the lawful obstruction of such laws makes it impractical to enforce the laws through ordinary judicial proceedings. The President, under section 332, is the absolute judge of what is necessary to enforce federal laws or to suppress a rebellion.[40] Section 332 significantly altered the Posse Comitatus Doctrine because it eliminated the concept that the use of troops as a military force was limited to situations where civilian measures, including the use of troops as civilians in the nature of a marshall's posse, have failed to control the exigency.

> The new legislation authorized the President to resort to military force without first relying on the civilian effort whenever he considered reliance upon civilian measures to be impractical. New language which has never been subjected to judicial scrutiny survives in 10 U.S.C. 332.[41]

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37. Act of May 2, 1792, ch. 28 § 2, 1 Stat. 264; Act of February 28, 1795, ch. 36, § 2, 1 Stat. 424; *accord, Comprehensive Study, supra* note 23 at 406.
38. *See* Act of July 29, 1861, ch. 25, 12 Stat. 281. *Accord, Comprehensive Study, supra* note 23 at 408 n.50.
39. *Comprehensive Study, supra* at note 23 at 408-09.
40. Whenever the President considers that unlawful obstruction, combinations, or assemblages, or rebellion against the authority of the United States make it impractical to enforce judicial proceedings, he may call into federal service such of militia of any state and use the armed forces as he considers necessary to enforce those laws or to suppress the rebellion.
41. *Comprehensive Study, supra* note 23 at 409. *See* discussion accompanying note 48 *infra* of Jackson v. Kuhn, 254 F.2d 555 (8th Cir. 1958). The case of *In re* Boyle, 6 Idaho 609, 57 P. 706 (1899), attempted to amend the rule that martial law could not be declared while civil courts were open, as held in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). The Idaho Supreme Court narrowed this limitation by adding that the courts must not only be open but also that their jurisdiction be unobstructed. Concerning the Pullman Strike, *see* note 52 *infra*. McElroy quoted Governor Altgeld's protest:

> [T]he conditions do not exist here which bring the cause within the Federal statutes, a statute that was passed in 1881, and was in reality a war measure. This statute authorized the use of federal troops in a state whenever it shall be im-

Congress delegated to the President the authority to use military force and the arbitrary discretion to *enforce* laws not only in situations of necessity but also in situations where such use is merely practical.

Total presidential discretion and the non-involvement of Congress in domestic military power was broadened even further in section 333 of Title 10 of the United States Code ("section 333"). This section was the result of the Civil War and the post-Civil War activities of the Klu Klux Klan. The Civil War accustomed the nation to seeing soldiers acting the part of soldiers of war, not civilians, on home soil. The passions of the conflict and the determination of the victors to compliment at all costs the social mandate of the victory, lead to the use of a solely federal military force, even after the war ended, to achieve government objectives for which the civilian process was too inefficient, too slow, or too obstinate.[42] This section, a remnant of the Ku Klux Klan Act of 1871, provides that the President may use the militia, the armed forces, or both to suppress an insurrection within a state which so hinders the execution of the laws of that state or the United States that it (1) deprives the people within the state of rights, privileges, or immunities or protection or (2) opposes or obstructs the execution of laws of the United States or impedes the course of justice under these laws.[43] Section 333 was enacted to enlarge the domestic circumstances in which the President could employ a solely military force. Under this section, the President may use the militia or regular federal troops without a request from the state government.[44] He may use the troops to enforce both state and federal laws and may call the troops as commander in chief even though sufficient federal civilian forces might have been able effectively to

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> practical to enforce the law of the U.S. within such state by the ordinary judicial proceedings. Such a condition does not exist in Illinois. There have been a few local disturbances, but nothing that seriously interfered with the administration of justice or that could not be easily controlled by the local or state authorities, for the federal troops can do nothing that the state troops cannot do.

R. McELROY, GROVER CLEVELAND THE MAN AND THE STATESMAN, Vol. 2, 154 (1923) [hereinafter cited as McELROY]. Cleveland was merely adhering to a practice frequently used by his predecessor, President Hayes, in breaking the many strikes that occurred during the Hayes administration. He repeatedly furnished the state authorities with arms from the national arsenals and federal troops upon informal requests from governors without ascertaining whether legislatures were in session. S. Doc. No. 263, 67th Cong., 2d Sess. 175 (1922).

42. *Comprehensive Study, supra* note 23, at 408.
43. 10 U.S.C. § 333 (1970).
44. Act of April 20, 1871, ch. 22, § 3, 17 Stat. 14. *Comprehensive Study, supra* note 23, at 409.

control the disorder.[45] This section embodies the greatest expansion of executive military discretion because it eliminates any need for state action as a condition of presidential action.

Section 334 of Title 10 of the United States Code ("section 334") is the last section of chapter fifteen and was intended to limit presidential discretion. But poor drafting has prevented this result. Section 334 requires the President to issue a proclamation whenever he believes it necessary to use military force under chapter fifteen. The proclamation shall "order the insurgents to disperse and retire peaceably to their abodes within a limited time,"[46] but no sanction is provided if the President disregards this statutory requirement.[47] The language of section 334 is an inadequate limit on the President even if a means of enforcement were provided because the President is only required to issue a proclamation if he uses sections 331, 332, or 333 to justify the deployment of troops. Any legislative authorization of presidential exercise of military discretion outside chapter fifteen does not require a presidential proclamation.

Although the constitutionality of chapter fifteen has never been tested,[48] the Supreme Court has held the President to be the sole judge of the necessity for calling the military into federal service;[49] and his decision concerning which of two opposing state militia to support cannot be questioned by the courts.[50] It has been asserted that the President has the power under the Constitution and laws of the United States to call the National Guard into federal service and to use those forces together with such of the armed forces as he deems necessary to suppress domestic violence, obstruction of federal law, and resistance to federal court orders.[51] The present view omits any concept of a posse comitatus, the use of only National Guardsmen, the retention of legislative control or

45. *Comprehensive Study, supra* note 23, at 409-10.
46. 10 U.S.C. § 334 (1970).
47. See discussion accompanying note 255 *infra* for same suggested remedies of the statute.
48. In Jackson v. Kuhn, 254 F.2d 555 (8th Cir. 1958), the court was faced with the issue of whether the three statutes of chapter fifteen were constitutional but never answered the issue because the appellants lacked jurisdiction and the actions were dismissed. *Id.* at 560. The court thus affirmed the district court holding that there was no substantial federal question in challenging the constitutionality of the statutes. *Id.* at 558.
49. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).
50. Luther v. Borden, 12 U.S. (7 How.) 1 (1848); *see also*, Scheuer v. Rhodes, 416 U.S. 232 (1974), where the Supreme Court modified this view by stating that the executive's discretion was judicially reviewable.
51. 41 OP. ATT'Y GEN. 313 (1957).

input into the deployment process as provided in the Constitution.[52]

b. The Army National Guard Act

The Army National Guard Act authorizes presidential discretion in the domestic use of National Guardsmen without a proclamation[53] because the statute is outside chapter fifteen. Section 3500 of Title 10 of the United States Code allows the President to call members of the state Army National Guard units into federal service for the purpose of repelling invasion, suppressing rebellion or executing laws. These orders are issued through state and territorial governors. Congress has codified the constitutional provision

52. These provisions have not prevented the President from acting without the request of the state governor. President Cleveland dispatched troops in the Pullman strike of 1894 over the protest of Governor Altgeld of Illinois who claimed he was capable of keeping order within the state. H.R. Doc. 9, 54th Cong., 2nd Sess., Part II, 60 (1894). *See* McELROY, *supra* note 41 at 151-63. Cleveland's action was approved in *In re* Debs, 158 U.S. 564 (1895), in the dictum of Justice Brewer when he stated: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." *Id.* at 582. *See* discussion accompanying note 41 *supra*. In the North American Aviation strike in California of June 5, 1941, President Roosevelt, without a request from the governor or legislature, deployed federal troops to operate the plant, citing his power as commander in chief to justify the deployment; Washington Post, June 10, 1941, at 3.

53. 10 U.S.C. § 3500 (1970).

> Whenever—
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> (1) the United States, or any of the Territories, Commonwealths, or possessions, is invaded or is in danger of invasion by a foreign nation;
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> (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
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> (3) the President is unable with the regular forces to execute the laws of the United States;
>
> the President may call into federal service members and units of the Army National Guard of any state or territory, Puerto Rico, the Canal Zone, or the District of Columbia in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States, the Territories, Puerto Rico, and the Canal Zone, and in the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

See also 10 U.S.C. § 673 (1970), which provides for calling the National Guard into federal service in either a declared national emergency or "when otherwise authorized by laws" either existing or enacted in the future; Linsalata v. Clifford, 290 F. Supp. 338 (S.D.N.Y. 1968); Goldstein v. Clifford, 290 F. Supp. 275 (D.N.J. 1968). 10 U.S.C. § 3500 (1970), is another existing law which authorizes federal use of National Guard troops whenever there is danger of rebellion or whenever the President is unable to execute the laws with "regular forces." *See* discussion accompanying notes 43 & 152 *supra*.

authorizing it to provide for a militia to be used domestically[54] and has delegated this power, in its entirety, to the President. The governors of states or territories do not limit presidential actions, but rather become a conduit for presidential power. If they were to refuse to execute the orders, the President could issue a proclamation under section 332 to the governor declaring him to be a dissident conspiring with the perpetrators of the exigency to obstruct the execution of the laws.[55] Thus National Guard troops are available to the President to execute any law without a proclamation, and any attempt by state officials to obstruct such an execution would justify a proclamation and use of National Guardsmen and federal troops against the state government.

These provisions within Title 10 of the United States Code have the effect of placing all domestic military power in the hands of the President to the exclusion of all other branches of government. Under these provisions, the President can use troops whenever they can restore order. By authorizing the use of federal as well as state troops, the concept of a civilian force acting in a military capacity to restore order is also undermined. The intent of the Constitution to safeguard against the rule of a military commander with the power to deploy a large standing army no longer exists because state control of the law enforcement can be set aside by the commander in chief acting under chapter fifteen without legislative involvement.

c. *The Posse Comitatus Act*

The concept of a local *civilian* force to control insurrection was totally misunderstood by the 1870s. As a result, the initial constitutional safeguards against martial law were further distorted by the adoption of the Posse Comitatus Act.[56] This act makes the willful use of the Army or Air Force as a posse comitatus a criminal offense punishable by fine or imprisonment or both except as expressly provided by the Constitution or an act of Congress.[57] The "acts of Congress" exception makes the sections regarding the use of troops in chapter fifteen of Title 10 (sections 331, 332, and 333) applicable to federal troops, but these sections do not "expressly" authorize local civilian use of the federal army or air force as a posse comitatus, subject to local civilian control.[58] Neither does

54. U.S. CONST. art. I, § 8, cl. 12.
55. *See* discussion, notes 41 & 52 *supra*.
56. 18 U.S.C. § 1385 (1970).
57. *Id.*
58. *See* discussion accompanying notes 15-21 *supra*. Other provisions frequently regarded as exceptions to the Posse Comitatus Act, though containing no express authorization for the use of troops, included 42

the Constitution "expressly" authorize such use of troops as a posse comitatus.

Thus, the statute completely outlaws the use of army or air force troops as a posse comitatus. The statutory use of federal troops under chapter fifteen, therefore, must always be subject to the control of the federal military or the Department of the Defense. The control of the populace by military rule is the definition of martial law which the Constitution sought to avoid,[59] thus the Posse Comitatus Act should be interpreted to mean that the presidential use of federal Army troops under chapter fifteen must include civilian control by the local government. Because the Posse Comitatus Act refers only to the Army and Air Force, there is an opportunity to circumvent further the Act's intent by using the Navy or Marines.[60]

The Posse Comitatus Act resulted from abuse of the posse by federal marshalls during the fifteen years following the Civil War. They used the federal troops to intimidate many areas of the South during the Reconstruction Era of the 1870s, particularly during the 1876 national election. The troops were used under the guise of a posse by the marshalls to perform various unlawful and unconstitutional acts.[61] The Reconstruction Era abuse of the posse was fur-

U.S.C. § 1855 (1970) regarding natural disasters. This section was recently repealed. *See* 18 U.S.C. § 1855 (Supp. 1975). Other provisions of lesser consequence allow the President to use military force at his discretion to remove unauthorized persons from land belonging by treaty to Indian reservations, 25 U.S.C. § 593(1), (5) (1970), 43 U.S.C. § 1065 (1970), 16 U.S.C. § 78 (1970), 16 U.S.C. § 23 (1970); to prevent offenses against neutrality, 22 U.S.C. § 461-62 (1970), 50 U.S.C. § 194 (1970), 22 U.S.C. § 408 (1970); to execute quarantine and health laws, 42 U.S.C. § 268 (Supp. 1975); to enforce United States customs laws, 50 U.S.C. § 220 (1970); and to protect the rights of the discoverer of Guano Island, 48 U.S.C. § 1418 (1970).

59. *See*, discussion accompanying note 27 *supra*.

60. Indeed the issue of whether a President may order the Marines to disperse civil disorders without an executive order under chapter fifteen and whether a local Marine commander may deploy troops for such purposes without congressional or executive directives arises periodically. "[I]t is not clear whether the President approved the use of Marine Corps personnel to assist municipal officials in suppressing a sniping incident in New Orleans in 1973 since no proclamation was issued." N.Y. Times, Jan. 9, 1973, at 22, cols. 2-3. A requirement that the President formally notify the public whenever he used troops in a law enforcement role would have eliminated any doubt whether the action was taken with the approval of the President or simply on the initiative of local military commanders, whether state officials had asked for help or whether the President was bypassing them, whether the Marines have become a national policy reserve force, or whether this was an isolated incident. *Accord*, 83 YALE L.J. 130, 148, 149 n.135 (1974).

61. *See Comprehensive Study, supra* note 23 at 410-11; Furman, *supra* note

ther complicated by the inability of Congress to comprehend either the concept of a posse comitatus or that the proper remedy for the situation was a re-emphasis of the posse as an entity subject to *local* civilian control as opposed to control by federal officers or federal marshalls. Congressional debate on the measure illustrated a change in the understanding of the posse comitatus. Traditionally, troops were to be used first as civilians and only secondarily as a military unit. The evolving notion was to use civilian law enforcement first and then to use the Army or militia as a military force.[62] The concept of using the Army under civilian control had been clouded and eventually lost.[63]

The use of troops after these measures involved a far broader standard than the previous one of merely an imperilous assault on the government of the locale, the state or nation. As Engdahl states: "Military troops insubordinate to local civil law officers, performing in obedience to military law and generals by fiat, suspending civilian law and liberties had become common place in controlling civil disorders."[64]

3. *Conclusion*

The Constitution embraces the concept of a posse comitatus as the only legitimate use of military force in a civil disorder. Present legislation concerning the use of military troops in civil disorders has deviated substantially from the intent of the Constitution's language.

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33 at 93-96. The election of President Hayes was so close that it depended upon one pro-Republican Supreme Court Justice. F. SPARKS, NATIONAL DEVELOPMENT, 1877-1885 THE AMERICAN NATION: A HISTORY No. 23, 120, 134 (1907). Democrats were exasperated with the machinations of the Republicans and Grant's use of troops. The Democratic Congress sought to limit the President's discretionary power to use military force by adopting the Posse Comitatus Act.

62. *See, Comprehensive Study, supra* 23, at 410-11.
63. *Id.* at 412.
64. *Id.* at 413. No one has ever been prosecuted for violating the statute. *See* Furman, *supra* note 33 at 86. There have also been many instances where marshals or other federal officials requested the use of troops and were refused. *See, e.g.*, 21 OP. ATT'Y GEN. 72 (1894); 17 OP. ATT'Y GEN. 71 (1881); 16 OP. ATT'Y GEN. 162 (1878); 18 U.S.C. § 1385 (Supp. 1970). In Hildebrandt v. State, 507 P.2d (Okla. 1973), and Burns v. State, 473 S.W.2d 19 (Tex. Ct. App. 1971), the courts held that the use of military intelligence in narcotics investigations does not violate this act. *See* discussion accompanying note 77 *infra*. Furman discusses an instance related to him by a commanding officer where a sergeant delivered a borrowed tank to local Texas law enforcement officers who needed it to rescue a fatally wounded deputy. Because no one but the sergeant could operate the vehicle, he felt required to participate in the rescue operation. He was never criticised on record. Furman, *supra* note 33 at 124 n.242.

The effects of the broad delegation to the President of power over the militia are three-fold: (1) It destroys the limitation normally provided by a system of checks and balances,[65] (2) it destroys any check within the federal system between state and national governments by failing to protect the posse comitatus against federal military encroachment, and (3) it provides for the destruction of the civilian's rights by sacrificing them to the principle of necessity[66] and martial law instead of protecting them through local civil law enforcement. This statutory scheme is much broader and power is much more concentrated than ever intended by the drafters of the Constitution. The history up to that time indicated that the citizenry desired control as well as participation in the domestic use of military power. The present statutory scheme conflicts with such a safeguard.

B. Executive Policy

The power delegated to the executive by the legislature has been organized with great efficiency and intricate detail. This efficiency, when coupled with the strength and technological sophistication of the military, has so expanded the executive's delegated power that there is a potential for subjecting the United States to the President's personal control quickly, easily and thoroughly.

Understanding these conclusions demands an understanding of the role played by executive policy. Unlike legislative and judicial directives which are addressed to all, executive orders are theoretically directed to departments of the executive branch concerning the implementation of legislative and judicial rulings and the proper reaction to the problems that arise.[67] In reality, they probably more directly effect the lives of most citizens than do either statutes or court decisions because it is executive orders that implement the legislation and decisions.[68]

Executive orders regarding domestic use of military troops direct subordinates in charge of deployment by establishing goals to be achieved and by defining the context for mobilization procedures.[69] Particular executive military orders do not limit the president's discretion because he can nullify a prior order with an-

65. *Ex parte* Merryman, 17 F. Cas. 144, 149-50 (No. 9487) (C.C.D. Md. 1862).
66. *See* discussion accompanying note 219 *infra.*
67. Richardson v. Young, 122 Tenn. 471, 125 S.W. 664, 668 (1910); Lime v. Bragg, 345 Mo. 1, 131 S.W.2d 583, 585 (1939); *see also* K. DAVIS, ADMINISTRATIVE LAW 36.02 (1972).
68. *See*, PARADE MAGAZINE, January 27, 1974, at 2 & 22,
69. 32 C.F.R. § 215 (1974),

other order at any time. With this in mind, the potential power to subject the United States to military control will be illustrated by analyzing (1) executive policy concerning that branch's delegated authority, (2) that policy's scope regarding contingent military operations to be implemented as a result of executive interpretation and (3) the effect of such operations on the American people.

1. Executive Interpretation of Delegated Authority

Executive orders regarding domestic military deployment have subtly undermined the weak statutory limitations placed on the President. The effect has been the establishment of full-scale coherent plans for the use of troops in instances and under circumstances beyond the scope and intent of the legislative scheme discussed above.[70]

The present executive policy is set forth in section 215 of Title 32 of the Code of Federal Regulations (hereinafter "section 215"). Its stated purpose is to support local civil authorities and protect life, federal property and federal functions during a civil disturbance.[71] A civil disturbance is defined as a group act of violence and disorder "prejudicial to public law and order" within the fifty states or territories[72] or as those domestic conditions requiring the use of federal armed forces pursuant to Chapter 15 of Title 10 of the United States Code.[73] The term "prejudicial" is an undefined standard. It could encompass a public dissent with a minor breach of the peace[74] as well as an actual armed and organized rebellion against the local, state or federal government.[75] The broad definition of civil disturbance and the undefined standard of "prejudice" permit wide-ranging discretionary interpretation by the executive.

The goal of section 215 (to protect lives, federal property, and federal functions) is ambiguous because it fails to indicate to subordinates whether troops should be used in the same manner when

70. *See* notes 35-64 & accompanying text *supra.*
71. 32 C.F.R. § 215.1 (1974).
72. *Id.* § 215.3.
73. *Id.*
74. *See,* DAVIES REPORTS, *supra* note 1 at 26843, where evidence indicated that the Kent State deaths resulted from what began as a demonstration against the Cambodian Invasion. The ROTC building on campus became the target of the demonstration and troops were deployed to extinguish fires and prevent destruction within the building. The troops were subsequently used to disband the demonstration. The students were killed on the next day in a setting devoid of a threat of violence to the National Guardsmen or to campus property.
75. This was the standard stipulated in *Ex parte* Milligan for determining when an exigency necessitates the use of troops. *See* notes 178-80 *infra,*

federal functions are to be protected as when property and lives are at stake. A federal function is liberally defined as any function, operation, or action "by any department, agency, or instrumentality of the United States government by a federal employee or officer."[76] The issue is whether military troops can be used, for example, to remove an obstruction of the mail though no armed organized rebellion exists.[77] The definitions are broad enough to be applicable to almost any situation of public dissent. Even without presidential involvement, subordinates in the executive department and state governors are left with broad discretion concerning the availability of federal military support.

Limitations of executive power, other than self-imposed limits, are derived from congressional application and court interpretation of relevant constitutional provisions. Statutes have notoriously neutralized constitutional constraints on the executive by delegating to the executive most congressional authority relating to the control of military force. The few limits placed on the delegated power because of the mere language of the statutes, have been undermined by overgeneralized executive policy interpretations of that legislation. Moreover, without congressional involvement and support, the courts have been ineffective in limiting executive military power.[78]

a. Executive Interpretation of the Constitution

The executive interpretation of the Constitution as set forth in section 215 allows a broader use of military forces than constitutional language would indicate. The justification found in section 215 for presidential deployment of troops domestically without specific statutory authority rests on three constitutional theories: (1) the executive's right to preserve public order in governmental op-

76. 32 C.F.R. § 215.3(d) (1974).

77. This exact issue was contested in the Wounded Knee trials and the government's right to use the military to remove obstruction of the mail was upheld. United States v. Jaramillo, 380 F. Supp. 1375 (D.C. Neb. 1974). In this case, the military had loaned to federal officials weapons and the allegation was made that armored vehicles were deployed. Testimony at the trial revealed that the Department of Defense directed the operations at Wounded Knee. *Id.* at 1377-78. The defense motion to suppress the prosecution's evidence because it was obtained through unlawful use of military troops without a proclamation was denied. Judge Urbom held, however, that it was never proved beyond a reasonable doubt that federal officials were acting lawfully as required by 18 U.S.C. § 231(a)(3) (1970), the statute under which charges were brought, because the prosecution failed to show that the Posse Comitatus Act was not violated. *Id.* at 1379-82.

78. *See* McGonagle, *Emergency Detention Acts: Peacetime Suspension of Civil Rights—With a Postscript on the Recent Canadian Crisis*, 20 CATH. U.L. REV. 203, 230 (1970) [hereinafter cited as McGonagle].

erations by force, (2) the executive's "emergency authority," and (3) the executive's authority to protect governmental property and functions. None of the interpretations are the result of express constitutional provisions, and to imply such authority conflicts with the concept of safeguarding against martial law by maintaining local and congressional involvement in the use of military power domestically.

The Constitution does not expressly grant to the national government the right to preserve public order in governmental operations, especially through force.[79] The implication to be drawn from the constitutional language and the intent of the drafters is that the militia, as the American posse comitatus, was the only force provided by the Constitution to control domestic violence.[80] Today, the militia is distinguishable from the regular Army as the state-controlled National Guard.[81] Thus, it is questionable whether the Constitution provides the federal rather than the state government the "inherent right to preserve public order in governmental operations by force."[82]

Neither does the Constitution grant to the executive the "emergency authority" to use military force to restore order, prevent loss of life and protect property during civil disturbances or disasters.[83] Section 215 does not refer to statutory or constitutional support for the "emergency authority" to use military force in disasters or calamities. The Constitution provides for use of the militia (presently the National Guard) only in instances of invasion, insurrection, or unexecuted laws or domestic violence.[84]

Finally, section 215 cites "the Constitution" generally for the authority to use military force to protect federal property and federal functions.[85] Neither the broad definition of federal functions in section 215, nor the right of the government to use military force is explicit within the Constitution or statutes. The Constitution authorizes the executive to "execute laws" but this does not neces-

79. 32 C.F.R. § 215.4(c) (1) (1974).
80. *See* discussion accompanying notes 8-32 *supra.*
81. *See* discussion accompanying notes 13-14 *supra.*
82. *See* discussion accompanying notes 218-47 *infra* concerning the inherent rights of government and the scope of those rights.
83. 42 U.S.C. § 1855 provides for federal assistance to areas of the nation incurring a "major disaster" as determined by the president. It provides for funding, supplies, personnel and general support and coordination by all federal agencies but it does not "expressly" authorize the use of any army troops as required by the Posse Comitatus Act; *see* discussion accompanying note 56 *supra.* National Guard troops are available, however, without violating that statute and are usually used under 10 U.S.C. § 3500.
84. U.S. CONST. art. I, § 8.
85. 32 C.F.R. § 215.4(c) (1) (ii) (1974).

sarily include protecting government property or government functions with military troops in all instances. Government property or operations could be obstructed without expressly violating a law. Further, neither the Constitution nor the statutes allow the use of military force to protect property or operations, even if they are obstructed.[86]

These three constitutional interpretations are significant expansions not only of constitutional power but of legislative power delegated to the executive by the Posse Comitatus Act.[87] Congress forbade *anyone* from using the Army or Air Force to execute or enforce laws, unless expressly authorized by Congress or the Constitution.[88] Since neither the Constitution nor legislation expressly authorizes the domestic use of military troops in catastrophies and disasters, to protect federal property or federal functions, or under an "emergency authority," presidential use of military power for these purposes would be a violation of the Posse Comitatus Act. This act is only applicable to use of the federal Army or Air Force so that using National Guardsmen, Navy or Marines to perform any of these undelegated and undefined tasks would not be unlawful.[89] The previously discussed National Guard Act[90] may not be applicable in all cases because, again, the protection of federal property and operations does not necessarily involve executing laws or suppressing insurrections; but even so, the executive use of only National Guard troops, though lacking congressional

86. U.S. CONST. art. IV, § 3, provides Congress with the power to make rules and regulations to protect the property of the United States. It neither gives any such power to the President nor specifically provides for the use of military troops. Chapter fifteen does not expressly provide for the use of troops to protect government property; *see* discussion accompanying notes 36, 40, 43 *supra*. 32 C.F.R. § 215 (1974) did not cite any legislation to support the executive's right to protect government property with military force but that executive order did cite the United States Constitution generally.

87. 18 U.S.C. § 1385 (1970); *see* discussion accompanying notes 56-64. Congressman Knott, the drafter of this Act, made it clear that he intended the word "whoever" to include everyone "from the Commander-In-Chief down to the lowest officer in the army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land." 7 CONG. REC. 3847 (1878). Since only Congress, not the President, has the constitutional authority to provide for domestic military force, this interpretation would not violate the President's constitutional authority. *See* discussion accompanying notes 31-33 *supra*. The sentiment of the Congress at the time of adopting the Act was that the President's authority ought to be limited. *See* discussion accompanying note 61 *supra*. *But see* Furman, *supra* note 33, at 98.

88. *See* discussion accompanying notes 56-64 *supra*.

89. *Id.*

90. 10 U.S.C. § 3500. *See* discussion accompanying notes 53 & 54.

and constitutional authority, is not prohibited by statute.[91] The previously discussed proclamation in section 334 of chapter fifteen of the United States Code is applicable only to those congressional authorizations of executive power within chapter fifteen of Title 10.[92] Thus, when using these three constitutional interpretations to justify the use of troops, the President is not required to issue any proclamation but can merely order the troops mobilized to the emergency site and to assume control of local operations.

b. Executive Interpretation of Statutory Authority

The executive interpretation of power delegated by Congress adopts the most discretionary view possible. This is evident in sections 331 and 332 of chapter fifteen of Title 10 and in section 3056 of Title 18.

There are two ambiguities in section 331. First, section 331 provides for calling into federal service "the militia of the other states . . . and use of such of the armed forces, as he considers necessary to suppress the insurrection"[93] within a particular state. Executive policy interprets "the militia of the *other* states" as an authorization to call the militia of *all* states including the disorderly state's own militia.[94] This interpretation in effect shifts control of the local militia from the state governor to the Department of Defense.[95]

The second ambiguity in section 331 is the provision authorizing the President to call the militia and "use such of the armed forces . . . ." An interpretation coherent with the intent and history of

91. 10 U.S.C. § 3062 defines "Army" to include the Army National Guard of the United States, the Army National Guard while in the service of the United States and the Army Reserve. From this it would seem that the term "Army" in the Posse Comitatus Act would also prohibit unlawful use of Army National Guard. *See* Furman, *supra* note 33 at 99. The National Guard, when nationalized, becomes part of the federal "Army." 10 U.S.C. § 3500 is an "expressly" authorized congressional exception to the Posse Commitatus Act permitting the President to use National Guard troops to repel invasion, to suppress insurrection and to execute the laws. *See* discussion accompanying notes 53-54 *supra*. The Department of Defense removes the state-appointed command structure and implements the Pentagon-appointed change of command. 10 U.S.C. §§ 3542, 3495-501 (1970). This statute, though a broad delegation of power, reflects the constitutional intent that a local civilian militia should suppress civil disorders. It fails to reflect the intent that the federal government or a single federal official should not have broad discretion. *See* discussion accompanying notes 24-26 & 33 *supra*.

92. *See* discussion accompanying note 29 *supra*.

93. 10 U.S.C. § 331 (1970).

94. 32 C.F.R. § 215.4(c) (2) (i) (1974).

95. *See* discussion accompanying notes 116-28 *infra*.

the Constitution and the statute is that the President may call the National Guard and use these troops as he deems necessary. The executive interpretation in section 215 adopts the unrestricted view that section 331 allows the use of both the milita (or National Guard) and armed forces (or regular troops) when a state is unable to control domestic violence and federal assistance is requested.[96]

Section 332 raises the same issue regarding use of only National Guard troops versus the use of both National Guard troops and the regular armed forces. Section 333 distinguishes the "militia" from the "armed forces" and provides for use of both in an exigency. This distinction is coherent with constitutional intent, but the authorization to use the armed forces breaches any constitutional safeguard against martial law.

The executive interpretation regarding section 332 is that both National Guard and regular troops can be used as in section 331. A second, and more significant, deviation in executive interpretation of section 332 is that it establishes the standard for using troops when government authority is so obstructed that it is "impractical to enforce the laws of the United States . . . by the ordinary course of judicial proceedings."[97] If this is interpreted as establishing that obstruction of the judicial process is the test for determining when an emergency necessitates using troops, then the statute codifies the holding in *Ex parte Milligan*.[98] The statute was revised shortly after the *Milligan* decision, indicating that this was probably the intent of Congress.[99] Section 215 of the Code of Federal Regulations provides a lower standard because it allows the use of troops when the exigency cannot be controlled by local law enforcement officials, even though the courts are still open, local government is not threatened, and other state means of handling the situation may not yet have been tried.[100]

Executive policy interprets section 3056 of Title 18 of the United States Code as authorizing the use of military force to protect governmental officers and major political candidates from physical harm. A resolution stating that "federal departments and agencies" are to assist the Secret Service in protective duties was passed June 6, 1968.[101] The resolution does not expressly authorize the use

96. 32 C.F.R. § 215.4(c) (2) (i) (a) (1974).
97. 10 U.S.C. § 332 (1970).
98. 71 U.S. (4 Wall.) 2, 121-22 (1866).
99. *See* discussion accompanying note 44 *supra*.
100. 32 C.F.R. § 215.4(c) (2) (i) (b) (1974). This is very similar to the holding of the Idaho Supreme Court in *In re* Boyle, 6 Idaho 609, 57 P. 706 (1899); *see* discussion accompanying note 41 *supra*.
101. H.J. RES. 1292, 90th Cong., 2d Sess. § 2 (1968), 82 Stat. 170. Executive Order 32 C.F.R. § 215.4(c) (2) (i) (d) (1974) refers to this resolution

of military troops to protect governmental officials and politicians, and to imply that the term "federal departments and agencies" authorizes the use of troops for this purpose violates the policy underlying the Posse Comitatus Act.[102]

The Constitution provides for military protection from invasion and authorizes the use of the military to guarantee a republican form of government to each state. These provisions do not expressly or implicitly include protecting rights of political candidates. The initial intent of the joint resolution was to protect government officials and political candidates through the use of regular law enforcement agencies such as the Secret Service, the Federal Bureau of Investigation and state and local authorities.[103] When these means are no longer effective, troops may be used, based, however, on a threat to law enforcement as a necessary part of the republican form of government rather than on the rationale of protecting individual politicians.[104] Without express congressional or constitutional authorization for the domestic use of troops, executive policy, if effectuated, would be a violation of the Posse Comitatus Act. As with the executive interpretations of the Constitution, this criminal liability could be skirted by using National Guard troops called into federal service.[105] Because the joint resolution[106] is outside chapter fifteen, the President would not be required to issue a proclamation to use troops.[107] They could be mobilized and deployed without notice to anyone except the commanding officer. Section 215, as a practical matter, does not restrict the President in this situation. Even though minor linguistic restrictions are present in chapter fifteen, they are ignored.

Perhaps the most significant aspect of this executive policy is that a resolution supplementing a statute is interpreted as authorizing unlimited discretion in the use of military troops in a political campaign. An actual exigency or a request by the political candi-

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which was passed two days after Robert F. Kennedy, then a presidential candidate, was shot.

102. 18 U.S.C. § 1385 (1970). *See* discussion accompanying notes 56-61 *supra.*

103. *See* 114 CONG. REC. 16170 (1968) (remarks of Senator Javits on H.J. RES. 1292, 90th Cong., 2d Sess. § 2 (1968), 82 Stat. 170 where Congress discussed the use of military troops to assist the Secret Service but failed to express such intent within the language of the resolution). *But see* Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130, 146 nn.114-15 (1973).

104. *See* discussion accompanying note 8 *supra.*

105. *See* discussion accompanying notes 89-90 *supra.*

106. *See* note 101 *supra.*

107. 32 C.F.R. § 215.4(c) (2) (i) (1974) notes that a proclamation is only needed under chapter 15 of Title 10. *See also* 10 U.S.C. § 334 (1970).

date for protection is not required. If this power were abused by subjecting an area to military control during an opponent's campaign, it could give the appearance that the candidate was a trouble maker whose presence necessitated the use of troops. Troops could thus be used to an incumbent's political advantage.[108] This portion of section 215 allows the executive to use military force without express congressional or constitutional authorization, without a proclamation, without guidelines or limitations concerning proper use, and without the consent of the individual in whose behalf the military is intervening.

The executive policy regarding the Army National Guard Act also assumes the broadest possible interpretation of the statute. Section 3500 Title 10 of the United State Code allows the President to call National Guard troops into federal service whenever he is

108. *See* Note, *supra* note 103 at 146 n.114 which stated:

> Troops have been detailed to assist the Secret Service on covert intelligence and law enforcement missions on a number of occasions, eight of them involving significant numbers of troops. In August 1968, 6000 regular troops were pre-positioned in Chicago under the direction of the Secret Service during the Democratic National Convention, *see* RIGHTS IN CONFLICT 103, 116 (Bantam ed. 1968) (study report of the National Commission on the Causes and Prevention of Violence). However, only a fraction of these were actually used—on covert intelligence missions. *See Hearings on Federal Data Banks, Computers and the Bill of Rights, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 1293, 1751 (1971) [hereinafter cited as *Hearings*].
>
> Troops were used during each of President Nixon's inaugurations under the direction of the Secret Service, *see* RIGHTS IN CONCORD 108 (G.P.O. 1969) (study report of the National Commission on the Causes and Prevention of Violence); SCHLOTTERBECK AND MANSINNE, *supra* note 63, at 8; N.Y. Times, Jan. 18, 1973, at 35, col. 3.
>
> Troops were used on three occasions to garrison the White House during anti-war demonstrations: in November 1969, May 1970, and May 1971, *see, e.g.*, Wash. Post, May 3, 1971, at 18, cols. 2 & 3; Demonstrations and Dissent in the Nation's Capital (Dep't of Justice Press Release, June 8, 1970), in *Hearings, supra* at 1384.
>
> Troops were also used under the control of the Secret Service during the 1972 Democratic and Republican National Conventions. *See* N.Y. Times, July 9, 1972, at 1, col. 2; *id.*, August 18, 1972, at 26, col. 6.

Troops were stationed under the control of the Secret Service during both the Democratic and Republican National Conventions for the purpose, according to the administration, of preventing another Chicago riot as in 1968. *See* N.Y. Times, July 9, 1972, at 1, col. 2; Wash. Post, August 18, 1972, at 26, col. 6. The presence of regiments of troops usually increases the chances of a riot. *See* discussion *infra* at note 219. Such a riot would have further split the Democratic Party, just as the Chicago riot split the Republican Party in 1968. *See* M. ROYKO, BOSS: RICHARD DALEY, 191-94 (1970). *See also* discussion *infra* at note 289 regarding the suspension of the 1972 election.

unable to execute laws with "regular forces." Whether "regular forces" refers to the ordinary administrative channels for executing laws or to federal armed forces has never been defined by Congress or the courts.[109] Executive policy as set forth in section 215 chooses the former, a lower standard.

The conclusion to be drawn is that the President takes the ambiguous language of the statutes delegating power and subtly expands their purposes. In some instances, the interpretation is so broad that it suggests usurpation of power. Restraints exist only in the language and not in procedural or institutional safeguards.

2. Contingent Military Operations

The risk of abuse in using military troops domestically could be substantial if a highly motivated but misguided executive were ever to be President. Section 215 which provides the basis for executive power in this area, provides a contingency plan for martial law including plans for troop deployment, control of the populace, and control of information passing between civilians and the government.[110]

These contingency procedures delegate to the Secretary of the Army most of the authority given to the President by chapter fifteen.[111] Section 215 authorizes the Secretary of the Army and politically appointed subordinates[112] to call federal reserve units and state National Guard units into active service.[113] The Secretary coordinates the mobilization with all local civil and military authorities and directs deployment of military resources through military commanders.[114] A civil disturbance need not be present to deploy troops; it is sufficient that there is a potential for a disturbance.[115]

109. Exec. Order No. 11519, 35 Fed. Reg. 5003 (1970). The inability to execute 39 U.S.C. § 707, 5102, 6001, 6101 (1958) regarding mail delivery during a postal strike was interpreted as sufficient inability to execute laws with "regular forces" as to require National Guard units. *See* discussion accompanying note 53 *supra*. *But see* Note, *supra* note 103 at nn. 109-73.

110. 32 C.F.R. § 215.5 to 215.10 (1974).

111. *Id.* § 215.6(c) (1974); *see also* 3 U.S.C. § 301 (1970), for presidential power to delegate authority.

112. These "subordinates" include the Secretary of Navy and the Secretary of the Air Force who would normally be equals to the Secretary of the Army, but in domestic deployment under § 215 they are subordinated to the Secretary of the Army who acts as coordinator. 32 C.F.R. § 215.6 (1974).

113. 32 C.F.R. §§ 215.6(a)(3), (4), (5)(ii) (1974).

114. *Id.* § 215.6(a)(10) (1974).

115. Alabama v. United States, 373 U.S. 545 (1963).

The contingency plans are consistent with the present military policy known as the Army Doctrine.[116] Under the Army Doctrine, the military would retain control of troops in the area subjected to martial law and take command of the local government. Total or partial control of troops by civil officials in the true historical sense of a posse comitatus is usually avoided.[117] Although the military has established military tribunals only in grave situations, such as in the midst of actual warfare, this limitation is maintained only in older cases such as *Ex parte Milligan*.[118] Training procedures for establishing military tribunals are maintained[119] but will not, according to the Doctrine, be implemented unless civil courts are closed.[120] The military, however, may close the courts as they did in 1941 when martial law was established in Hawaii after the bombing of Pearl Harbor.[121] The command control of the troops remains with the federal government acting through the Joint Chiefs of Staff.[122] They are to utilize already established plans of "specified and unified commands" to direct the mobilization and use of troops for controlling the populace.[123] These prepared reports exist in the Joint Reporting Structure and provide coordination of command, control and communications.[124]

The army has planning packets with plans for handling civil disturbances occuring in many cities while still maintaining the national defense posture.[125] When the military establishes control, local authority is subordinated. The military enforces laws and provides relief at the direction of the executive department, including the Joint Chiefs of Staff, acting through the Directorate of the Military Command, and the President.[126]

By claiming the right to use the military in national disasters and calamaties, the executive can utilize the contingency plans of

116. *See* DoA PAMPHLET 27-11.
117. Comment, *Martial Law and the National Guard*, 18 N.Y.L.F. 216, 229 (1972). In Hawaii after the bombing of Pearl Harbor, the entire territorial government was turned over to the military and civil courts were closed. Duncan v. Kahanamoku, 327 U.S. 304 (1945). *See* discussion accompanying notes 186-90 *infra*.
118. DoA PAMPHLET 27-11; *see* Comment, *supra* note 117 at 229; Lectures on Martial Law for the Judge Advocate General's School 23-27 [hereafter cited as J.A.G. Lectures].
119. *See* J.A.G. Lectures, *supra* note 118 at 23-27.
120. *Id.* at 17.
121. *See* J.A.G. Lectures, *supra* note 119 at 16-17; Duncan v. Kahanamoku, 327 U.S. 304, 308-09 (1945).
122. 32 C.F.R. §§ 215.6(a)(7), 215.6(6)(1), 215.7(a)(1) (1974).
123. *Id.* §§ 215.6(a)(7), 215.7(a)(1) (1974).
124. *Id.* § 215.6(a)(7) (1974).
125. *Id.* § 215.6(a)(8) (1974); *see also* CIVIL DISORDERS, *supra* note 13 at 500-01.
126. 32 C.F.R. 215.5, 215.6 (1974).

the Office of Emergency Preparedness.[127] These plans provide for control of elements within a geographic area.[128] Deploying troops means that the Joint Chiefs of Staff and their military subordinates assume command over the locale, displacing state and local officials. The planning information for controlling the populace is unavailable to the public. It is available, however, to the various commanders at the time troops are mobilized.[129] All information released to the public is controlled by the Assistant Secretary of Defense. In certain instances the military may even take control of the news media in the area, particularly the broadcasting industry, and disseminate the news.[130]

The military also controls and classifies information it obtains during the disorder. The military follows specific procedures in the collection and maintenance of intelligence data.[131] This information is usually the most complete and accurate account of the emergency conditions available because it is usually obtained through the only organized, controlled operation and channeled through a centralized command center.[132]

The executive branch has statutory authority to withhold this information if it is deemed relevant to the national defense or is part of investigatory files compiled for law enforcement purposes.[133] A citizen wishing to challenge presidential use of troops after the violation of constitutional rights by the military must overcome "executive privilege" or have available his own accurate data concerning the events. A potential plaintiff must challenge the privilege's applicability without an opportunity to evaluate the evidence.[134] In effect this creates a presumption that the President

127. 32A C.F.R. DMO VII-7 to DMO 8555.1A (1974).
128. These include such things as maintaining law and order, distributing food, and controlling transportation, utility and communication facilities. 24 C.F.R. § 2200 (1974).
129. 32 C.F.R. § 215.6(a) (7) at n.3 (1974).
130. In Hawaii after the attack on Pearl Harbor, the military subjected the radio and theatre industries to strict censorship regulations; *see* J.A.G. Lectures, *supra* note 119 at 33.
131. 32 C.F.R. § 215.6(a) (8) (1974); and 32 C.F.R. § 292 (1974).
132. *See* McGonagle, *supra* note 78 at 213-14. *See also* CIVIL DISORDERS, *supra* note 13 at 504-12.
133. 5 U.S.C. § 552 (1970).
134. Rule 509(c) of the Proposed Federal Rules of Evidence provided a privilege for secrets of state and other official information. In the case of "secrets of state" (which under the proposed rules included a governmental secret relating to the national defense), upon motion of the government, the judge could permit the government to make an in camera showing of a reasonable likelihood of danger. The version of the Federal Rules recently enacted by Congress, Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, eliminated specific privilege rules and substituted the following:

and his subordinates correctly perceived and reacted to the circumstances.[135] Much of the available evidence consists of intangibles such as the officials' experience, feelings and intuitions.[136] There have been instances in which courts have been unable to reject the executive's description of the emergency because of limited public access to evidence which even when available tends to be subjective.[137]

Thus, section 215 not only provides the broadest executive discretion possible but also contains contingency plans directing the coordination and control of troop deployment. The plans coordinate military intelligence data and restrict public access to information. Further, even in court, access to information is limited by the doctrine of executive privilege. The combination of delegating military power to the executive, executive expansion of this power and the coordinated use of the military threatens individual rights.

3. *The Effect of Military Control*

The effect of military control on individiual rights depends upon the fate of the Writ of Habeas Corpus and, ultimately, on the ability of the populace to subdue the military in the event power is abused. The "Great Writ" is vital because it provides an unlawfully detained individual his only access to a court where he can effectively assert his rights, demonstrate the unlawfulness of his detention, and obtain redress of his injuries. Without access to the Writ of Habeas Corpus, the populace could only rely on the military's self-restraint to avoid oppression.

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

For a detailed discussion of the executive privilege issue, see *Separation of Powers and Executive Privileges: The Watergate Briefs,* 88 POL. SCI. Q. 582 (1973); *see also* United States v. Nixon, 94 S. Ct. 3090 (1974).

135. McGonagle, *supra* note 78 at 213.

136. *Id.*

137. *In re* Hirabayashi, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944). *But see* Korematsu v. United States, 323 U.S. 214, 242 (1944) (Jackson, J. dissenting).

The availability of the Writ may affect the tactics employed by the military. Suspending the Writ of Habeas Corpus delays the operation of its guarantees. Although the Writ may not be totally abolished because it has been held to be permanently established in the Constitution,[138] during its suspension the military can detain individuals without bringing them before a court for arraignment and without affording them their due process rights such as bail, and right to counsel.[139] While it is clear that acting together, the

138. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125-26 (1866); *accord*, McGonagle, *supra* note 78 at 226.

139. Under 50 U.S.C. §§ 811, 812(a)(3) (1950), *repealed* act of Sept. 25, 1971 Pub. L. No. 92-128, § 2(a), 85 Stat. 348, the President had the power to detain large numbers of people in non-war situations to maintain internal peace under § 812(a)(3). He also had the power under the Emergency Detention Act to create "concentration camps" to be used in time of a presidentially declared "internal security emergency." McGonagle, *supra* note 78 at 204 nn. 2-3. The legislation was largely the result of the McCarthy era of the early 1950s and was a response to the fear of communism. *Id.* at 207-09. In 1969, there were rumors that the Nixon administration was readying concentration camps, which had been constructed in the 1950s but were later abandoned, for use against residents of ghettos and political dissidents, 1 T. EMERSON, D. HABER & N. DORIEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 186 (stud. ed. 1967); *Concentration Camps in America?* 60 *Minutes*, vol. 1, No. 18 (CBS Television Network, June 24, 1969). *Accord*, McGonagle, *supra* note 78 at 207 n.9. *See also* discussion accompanying note 280 *infra*. The House Committee on Un-American Activities had been contemplating use of "guerilla warfare." After McGonagle's article discussing the hazardous potential of such legislation by comparing it to recent instances of martial law in Canada and South Africa, the statute was repealed in 1971 by Act of Sept. 1, 1971, Pub. L. No. 92-128, § 2(a), 85 Stat. 348.

Repealing that statute has not eliminated the threat of detaining political dissenters in concentration camps. Anyone can be imprisoned up to one year who "enters, remains in, leaves or commits an act in any military area or military zone prescribed under the authority of an executive order of the president, by the Secretary of the Army, or by the military commander . . . .", 18 U.S.C. § 1383 (1970). Under this statute, President F.D. Roosevelt issued Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942), ordering persons of German and Italian extraction to be excluded from certain areas and the mass exclusion and relocation of persons of Japanese extraction into concentration camps on the West Coast. All coastal states were declared to be military areas and placed under the authority of military commanders. *See* 7 Fed. Reg. 2320 (1942) (regulating the West Coast); 7 Fed. Reg. 3830 (1942) (regulating the East Coast); 7 Fed. Reg. 6754 (1942) (regulating the Gulf Coast). The Supreme Court upheld the convictions of Japanese-Americans for violation of exclusion and curfew orders and their relocation in concentration camps. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Yasui v. United States, 320 U.S. 115 (1943). In *Ex parte* Mitsuye Endo, 323 U.S. 296 (1944), the Supreme Court ordered the release of a Japanese-American held in a relocation center, on the basis that she could be excluded from a certain area but could not be detained by the War

President and Congress may suspend the Writ,[140] it is unsettled whether Congress acting alone may do so.[141] Likewise, it is not clear that the President, at a time when Congress is in session, may unilaterally suspend the Writ.[142] If Congress were not in session, however, and there existed a dangerous situation necessitating, in the President's judgment, suspension of the Writ the President may constitutionally suspend the Writ in order to guarantee a republican form of government. If Congress later ratifies the President's actions, the issue becomes moot.[143] Even if the Writ were not suspended and detained individuals invoked its protection, the courts might be reluctant to act because of the politically sensitive nature of the situation.[144] A person detained can be released under the Writ of Habeas Corpus only after government objectives have been achieved,[145] and, therefore, only after his civil liberties have been denied. The courts would be unable to act quickly in this situation because the evidentary problem of executive privilege would again arise.[146] The sheer number of detainees could overwhelm the court, making court procedures totally inapplicable or so prolonged that, in effect, a "suspension" has occurred.[147] Finally, the court could be closed entirely by the military.[148] Thus, a citizen's rights can be lost either through delayed court intervention or no court intervention at all.[149]

If the proper conditions existed for complete military control

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Relocation Authority after her loyalty to the United States was conceded. Thus, there remains a court-tested, statutory authorization for executive detention of citizens in concentration camps for the purpose of preserving national security or, more specifically, on suspicion of sabotage and espionage, though no such incident has occurred.

140. *Id.*

141. J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 135-36 (rev. ed. 1951). *See also* CORWIN, *supra* note 33 at 146 and U.S. CONST. art. I, § 9 ¶ 2. *Accord*, McConagle *supra* note 78 at 226.

142. *Ex parte* Merryman, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861) which held that the President could not suspend the Writ of Habeas Corpus was only a circuit court opinion. Congress delegated power to President Lincoln to suspend the Writ before the case could be appealed to the Supreme Court. Thus, this issue was never completely settled. McGonagle, *supra* note 78 at 226. The *Merryman* opinion by Chief Justice Taney has been interpreted as a non-definitive answer on the issue. 10 OP. ATT'Y GEN. 74 (1861).

143. *See* U.S. CONST. art I § 9 ¶ 2; art. IV § 4; and art. II § 3. *See* CORWIN, *supra* note 33 at 143.

144. *See* McGonagle, *supra* note 78 at 226.

145. *Id.* at 225.

146. *Id.* at 226. *See* discussion accompanying notes 131-37 *supra.*

147. *See, e.g.*, Sullivan v. Murphy, 478 F.2d 938 (1973).

148. *See* discussion accompanying note 116 *supra.*

149. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943) and Korematsu v. United States, 323 U.S. 214 (1944). *See also* McGonagle *supra* note 78 at 225.

under the section 215, the risk of oppressive force is great. The military has the ability to dominate society. The populace would have neither the strength nor organization to overthrow the sophisticated and well-trained armed forces of the United States.[150] The troops themselves might have the ability to rebel, but the legal and practical risk involved greatly inhibits the likelihood of such a rebellion. The soldier would face disciplinary procedures for refusing to obey a command or obstructing the execution of an order.[151] If, on the other hand, he executes an order of questionable validity, he would be protected from civil and criminal liability in most states by immunity statutes, and unless the order is manifestly illegal, the soldier will not be liable.[152] The soldier may be liable

150. The regular United States Armed Forces have historically always been able to overcome recalcitrant forces. *See* Mutter, *Some Observations on Military Involvement in Domestic Disorders*, 29 FED. B.J. 59, 60 (1959). The Confederate Army is the best example of a well organized and well lead army that was unsuccessful. Even if the populace could be organized as well as the Confederate Army, it would still have to overcome the superior planning and sophisticated equipment that the United States Army has developed since the Civil War.

151. The legality of military orders is almost an irrebutable presumption. Both state (*e.g.* N.Y. MIL. LAW § 130.33 (McKinney 1955)) and federal (*e.g.* 10 U.S.C. §§ 890-892 (1970)) laws punish disobedient soldiers. *See* United States v. Trano, 1 U.S.C.M.A. 293, 297, 3 C.M.R. 27, 31 (1952); United States v. Thorton, 34 C.M.R. 958 (Bd. of Rev. 1964); United States v. Buttrick, 18 C.M.R. 622 (Bd. of Rev. 1954); United States v. Gallagher, 15 C.M.R. 911 (Bd. of Rev. 1954); United States v. Reese, 7 C.M.R. 292 (Bd. of Rev. 1953); United States v. Rosato, 5 C.M.R. 183 (Bd. of Rev. 1952); United States v. Whittaker, 5 C.M.R. 539 (Bd. of Rev. 1952). *Accord*, Ness, *supra* note 117 at 239-40.

The presumption has been held rebuttable. United States v. Bayhand, 6 U.S.C.M.A., 762, 21 C.M.R. 84 (1956); United States v. McCarthy, 23 C.M.R. 561 (Bd. of Rev. 1957); United States v. Roadcloud, 6 C.M.R. 384 (Bd. of Rev. 1952). *Accord*, Comment, *supra* note 117 at 240.

152. Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 55 A. 952 (1903); *cf.* Bean v. Beckwith, 85 U.S. (18 Wall.) 510 (1873); Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944). *Accord*, Comment, *supra* note 117 at 236-37. Some state courts have held military immunity statutes to be unconstitutional and invalid as a denial of state due process if the statute's protection exceeds the civil immunity of regular law enforcement officers. O'Shee v. Stafford, 122 La. 444, 47 So. 764 (1908); Bishop v. Wandercook, 298 Mich. 299, 200 N.W. 278 (1924). *Accord*, Comment, *supra* note 117 at 236-37. But soldiers are rarely prosecuted. *Id.* at 240. An example of rare prosecution of soldiers is the Kent State case where the evidence preserved in pictures and eyewitness depositions strongly suggested a criminal conspiracy to commit murder. *See* DAVIES REPORT, *supra* notes 1-8. Even though Attorney General John Mitchell agreed with the President's Commission that the rifle fire was "unnecessary, unwarranted and inexcusable," in a statement released by the Justice Department on August 13, 1972, REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST 289 (1970) [hereinafter cited as CAMPUS UNREST], a federal grand jury was not

for violating the Civil Rights Act by depriving an individual of his civil rights under the color of law, but only if the deprivation was unnecessary to suppressing the insurrection.[153] Finally, the soldier usually lacks a clear, complete, factual picture of the chaotic situation to determine for himself the necessity of the order.[154] When the soldier weighs all these elements he would most likely follow the order, avoiding disciplinary action and taking advantage of state immunity statutes.

C. Judicial Construction

The judicial branch of the federal government has been ineffective in deterring the delegation of military power to the executive and executive expansion of that power. As the forum for redress of infringed rights of individuals, the courts have only recently opened to judicial review the infringement of individual rights resulting from an executive determination to use military troops in a domestic civil setting. Actual standards defining and limiting executive power have not yet emerged.

The judiciary has concerned itself with two general issues in its review of those cases involving this situation. The first is whether the executive's determination that an emergency necessitating the use of troops *exists* is conclusive and thus beyond judicial review; the second is whether the court will review the *use* to which such troops are put by the executive. The result is that the executive determines what constitutes an exigency necessitating military force and the manner in which military force will be used. The courts will not interfere with executive use of military power until *after* individual rights have been infringed and, even then, interference is rare. The major issue to be resolved is the scope of executive power and of executive immunity upon breaching limitations on that power.

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convened until February 15, 1974 and indictments against eight guardsmen for violations of the Civil Rights Act were not returned until March 29, 1974, almost four years after the initial slayings. The charges were subsequently dismissed on November 8, 1974. N.Y. Times, Nov. 9, 1974, page 1, col. 3.

153. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974) and discussion accompanying note 171 *infra*.

154. *See* Comment, *supra* note 117 at 240. The courts usually discuss "executive" power in general whether referring to a state executive or the federal executive. The federal executive has been confronted in court far less frequently than state executives, but in the two major instances of *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 128-29 (1866) and Duncan v. Kahanamoku, 327 U.S. 304, 314 n.10 (1944), the Court relied on precedents relating to the exercise of similar power by state executives.

1. The Power to Declare Exigencies

An analysis of the judiciary's role in the domestic uses of military power must begin by distinguishing the executive power to declare an exigency from executive use of military troops. In attempting to separate the declaration of an exigency from the actual use of troops in these situations, it is necessary to discuss their respective derivations. Then a standard to be used by the executive in determining when an exigency necessitates a proclamation deploying military troops must be formulated.

Scheuer v. Rhodes[155] is the most recent United States Supreme Court case in the area of domestic military power. The Court appears to have opened to judicial review the executive's discretion to declare an exigency necessitating military intervention. *Scheuer* becomes relevant only upon understanding the prior conflicting precedents of the Supreme Court and the courts of appeals. *Morgan v. Rhodes*[156] was the first case to arise out of the Kent State University homicides. The plaintiffs in *Morgan* sought injunctive and declaratory relief against the Governor of Ohio and officers of the Ohio National Guard to prevent domestic use of troops on the basis that they were so inadequately trained that they would jeopardize life, limb, and constitutional rights. The plaintiffs separated the right of the executive to proclaim an exigency from the right of the executive to use the troops once the proclamation has been made. By combining this with an action for injunctive relief the plaintiffs presented the court squarely with (1) these two issues, often undistinguished, which were first articulated in *Sterling v. Constantin*,[157] and (2) the issue of preventing a future proclamation which would lead to violations of constitutional rights. The Court held the executive's determination to declare a state of emergency and call out troops was conclusive and not reviewable. The injunctive relief from future premature deployment of military forces was dismissed as an inappropriate substitute for executive discretion. The Court affirmed a long line of precedent in dismissing the first cause of action by stating:

> Executive decisions to call out military force have been litigated a number of times in the history of the Republic. . . . But we find no instance where the courts have sought to substitute judicial judgment for constitutionally empowered judgment of the executive. Still less have the courts cumbered that executive judgment with the prior restraint of an injunction seeking to describe in advance the precise conditions which would make its exercise appropriate.[158]

155. 416 U.S. 232 (1974).
156. 456 F.2d 608 (6th Cir. 1972).
157. 287 U.S. 378 (1932).
158. 456 F.2d 608, 610 (6th Cir. 1972). Precedent cited consisted of Duncan

The *Morgan* Court relied heavily upon *Sterling v. Constantin*[159] which held an executive determination to declare an exigency necessitating the use of troops to be conclusive. According to the *Sterling* Court, such power is necessary to the executive's ability to exercise proper control in instances of sudden emergencies on grave occasions to the union's existence. The power has a permitted range of honest judgment for flexible measures to suppress violence and to restore order.[160]

The permitted range of judgment was the standard established in *Moyer v. Peabody*.[161] Under the *Moyer* Doctrine, the executive has the authority to declare martial law, to detain citizens, and, if necessary, the right to kill or seize bodies to prevent hostilities, but not necessarily the authority to punish. The *Moyer* Court stated, "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[162] The *Sterling* opinion quoted this language to support their holding that the executive's determination of an exigency is conclusive, where *Moyer* intended all domestic military action by the executive to be conclusive without distinctions within that power. The *Sterling* Court's further holding that the executive could not order troops to perform acts which unnecessarily violate constitutional rights,[163] conflicted with *Moyer*. Where *Moyer* held that executive discretion regarding domestic military power was absolute in *all* respects, *Sterling* had two distinct holdings which separated the discretion regarding *use of troops* (held to be reviewable) from the absolute discretion to *declare an emergency*.[164]

v. Kahanamoku, 327 U.S. 304 (1946); Sterling v. Constantin, 287 U.S. 378 (1932); Moyer v. Peabody, 212 U.S. 78 (1909); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Luther v. Borden, 48 U.S. (7 How.) 1 (1848); and Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

159. 287 U.S. 378 (1932). The case involved an injunction obtained by owners of Texas oil wells against an order of the Texas Governor to limit oil production. The Governor ignored the injunction and declared a state of martial law, though there was no armed insurrection or chaos by the oil well owners. He called the state militia to enforce his first order. The property owners sought a second injunction and appealed to the Supreme Court on the issue of whether such an injunction was within the scope of the judiciary's authority.

160. *Id.* at 399-400.

161. 212 U.S. 78 (1909).

162. *Id.* at 85.

163. The Texas Governor's orders were held to constitute an unlawful taking of private property by the state without due process of law. 287 U.S. 378, 403-04 (1932).

164. Commentators and decisions often fail to distinguish the holding regarding *use* of troops (which is reviewable) from the holding regarding the *declaration* of an emergency (which is not reviewable). *See*

Subsequent lower court cases attempted to expand what was included within the term "unlawful and unnecessary use of troops."[165] Thus *Sterling*, in theory, concurred in part and reversed in part the *Moyer* decision.[166] The *Morgan* court adopted the *Sterling* adaptation of the *Moyer* Doctrine and held the executive's decision to declare an exigency to be conclusive.

On appeal to the United States Supreme Court, the portion of the *Morgan* decision refusing to review the executive's proclamation was upheld in *Gilligan v. Morgan*.[167] The plaintiffs in *Gilligan* argued that the troops, because of their training, were inherently dangerous in an emergency setting and that by declaring an emergency, they were automatically placed in such a situation with little chance for further instruction. Thus, the declaration would be dangerous to the constitutional rights of citizens and should be enjoined until the training procedures were changed.

Gilligan presented the Court with the opportunity of fusing the separate issues of executive proclamation and executive military action under the proclamation into a single issue—the threat to constitutional rights posed by the mere declaration of an emergency. The Court failed to grasp that the issue involved was the specific training techniques which link the governor's proclamation to violations of constitutional rights. By holding the training techniques to be unconstitutional, the Court could have provided guidelines to the executive and legislature. Plaintiffs argued that because the training techniques resulted in unconstitutional tactics which had caused injuries or death, and because a proclamation initiated such unconstitutional tactics, the executive should be enjoined from making a proclamation until training techniques were corrected. The Court, however, saw the issue as being an open and constant review on all legislative actions relevant to National Guard training procedures. The Court, reversing the court of appeals decision in *Morgan* to remand on the training procedures issue, dismissed this issue as a political question, but upheld the lower court's dismissal of the executive proclamation issue. The effect of *Gilligan v. Morgan* is to allow executive decisions regarding the

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Engdahl, *Comprehensive Study*, 43 U. COLO. L. REV. 399, 414 n.79 (1972); *see also* Duncan v. Kahanamoku, 327 U.S. 304, 321 n.18 (1946); Scheuer v. Rhodes, 416 U.S. 232 (1974); Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972); Valdes v. Black, 446 F.2d 1071 (10th Cir. 1971); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971).

165. *See* Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959); Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D. Minn. 1936); State v. McPhail, 182 Miss. 360, 180 So. 387 (1938).

166. *But see* Engdahl, *Comprehensive Study*, *supra* note 164 at 414 n.78.

167. 413 U.S. 1 (1973).

domestic use of troops to remain unchecked by judicial review.[168]

After *Gilligan*, the Fourth Circuit retreated to the "political question" position when the issue of reviewing executive proclamations arose in *Krause v. Rhodes*.[169] The court affirmed the dismissal of the case when the defendant, Governor Rhodes, presented his proclamation of an emergency in his answer. The court held that the proclamation was conclusive and absolute authority for any extraordinary actions necessary to meet the disorder. The remedy, according to the court, was not judicial review, but rather rested with the legislative and executive branches of government. The court also held the Governor was immune under the eleventh amendment from prosecution for actions taken within the capacity of his office.[170]

The two *Sterling* holdings were finally merged when the *Krause* decision was appealed to the Supreme Court. The Court, in *Scheuer v. Rhodes*,[171] unanimously held both the executive proclamation and use of troops were subject to judicial review. The actions of state officials acting within the capacity of their office are subject to federal law when they deprive individuals of their constitutional rights under the color of law.[172] The Court adopted a standard of "qualified executive immunity." This means that although the chief executive is limited in eleventh amendment immunity, he may exercise discretion within the scope of responsibilities of his office in responding to the circumstances as they reasonably appear to him at the time.[173] As the state official's position in the government rises, his discretion widens, and he may react to a crisis with unimpeded affirmative action. In times of civil disorder the populace is skeptical, the facts are confused and chaotic, and use of force usually necessitates suspending civil liberties. The chief executive must have very broad discretionary power but it should not be unchecked.[174]

The Court provided the means for checking executive power when it quoted the passage from *Sterling* which limited the executive *use* of troops by allowing judicial review whenever there

168. The estates of the other students attempted to sue the State of Ohio in the state courts. The cases were dismissed in the trial court, and the appellate court reversed and remanded. The cause was certified by the Ohio Supreme Court which reversed the judgment of the court of appeals because the state had not consented to the suit. Krause v. Ohio, 31 Ohio 2d 131, 285 N.E.2d 736 (1972); *see also* Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972).
169. 471 F.2d 430 (6th Cir. 1972).
170. *See Ex parte* Young, 209 U.S. 123 (1908).
171. 416 U.S. 232 (1974).
172. *See* 42 U.S.C. § 1983 (1971).
173. 416 U.S. at 247-48 (1974).
174. *Id.*

was a substantial showing of an individual's rights being violated.

> "When there is a substantial showing that the exertion of the state *has* overridden private rights securred by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individual's charged with the transgression." *Sterling v. Constantin*, 287 U.S. 378, 397-398 (1932).[175]

The district court's dismissal was inappropriate because there was no factual record. The Court held that a dismissal based only on proof of the executive proclamation was premature and that there could be no presumption of executive good faith nor could the court take judicial notice of "mob rule" at Kent State University without allowing the plaintiffs to prove the contrary. Thus, the *Scheuer* Court held an executive proclamation to be less than conclusive but having "great weight" with citation to *Moyer*. The Court remanded the case for trial on the merits with instructions to allow the allegations in the plaintiffs' pleadings to be raised, proved and reviewed, including the proclamation and the use of troops following it. The Court said:

> The documents properly before the District Court at this early pleading stage specifically placed in issue . . . whether [the Governor and his subordinate officers] acted in good faith both *in proclaiming an emergency and as to the actions taken to cope with the emergency so declared* . . . . The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint . . . . We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved.[176]

Scheuer v. Rhodes answered in the affirmative the question of whether the executive declaration of an exigency is subject to judicial review. The Court failed, however, to respond to the problem of excessive military power accumulated in the hands of the executive. It should have taken a more active role in controlling the military through judicial review, thus providing a check on executive power. The dichotomy between *Gilligan* and *Scheuer* points to the Supreme Court's unwillingness to adopt pre-violation measures to protect constitutional rights. The law now remedies violations only after they occur.

Scheuer also failed to enunciate guidelines for determining the parameters of constitutionally permissible executive declarations. The *Milligan* Doctrine, though substantially eroded by time and later decisions,[177] supplements the current law as set forth in *Scheuer v. Rhodes* by providing guidelines for making executive proc-

175. *Id.* at 249 (emphasis added).
176. *Id.* at 250 (emphasis added).
177. *See, e.g.*, discussion of Duncan v. Kahanamoku, notes 184-91 *infra*.

lamations.[178]

The United States Supreme Court in *Ex parte Milligan*[179] held that martial law cannot be established unless there is a valid threat of invasion or insurrection. Martial law can never exist while civilian courts are open and in proper and unrestricted exercise of their jurisdiction.[180] The Court subjected the executive's determination to declare martial law, as well as the subsequent use of troops, to judicial review and attempted to establish standards for determining when an exigency exists. The *Milligan* Doctrine was later eroded by *Moyer v. Peabody*,[181] *Sterling v. Constantin*[182] and other lower court decisions which held the executive determination to use troops absolute and beyond judicial review.[183] The *Milligan* standards have also been weakened by later holdings that the mere threat of insurrection or disorder is sufficient to warrant deployment of federal troops.[184]

Duncan v. Kahanamoku[185] is the only other Supreme Court case where the declaration of martial law, though initially valid, was reviewed to determine whether the exigency necessitating martial law still existed. In that case, the Governor of the territory of Hawaii declared martial law, with presidential authorization, on the day after the attack on Pearl Harbor. The Governor stepped down from his position and was replaced by a military commander, civil courts were closed and all persons were tried before a

178. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), illustrates the strictest judicial scrutiny to which a decision of a President of the United States has ever been subjected regarding domestic use of military troops when the court challenged President Lincoln as principal and a subordinate officer as agent on whether an actual emergency necessitating martial law existed.

179. 71 U.S. (4 Wall.) 2, 126-27 (1866). Even though the State of Indiana had been threatened by invasion of the Confederate Army, early in the Civil War, the Court held that Milligan's conviction for unlawfully assembling, conspiring, aiding and abetting the enemy was invalid because he was tried before a military tribunal while civil courts were still open. *Compare* Alabama v. United States, 373 U.S. 545 (1963), where the Court stated that troops could be deployed in advance of any civil disturbance if a mere threat of insurrection existed.

180. *Id.* at 127.

181. Moyer v. Peabody, 212 U.S. 78 (1909).

182. Sterling v. Constantin, 287 U.S. 378 (1932).

183. *See* Morgan v. Rhodes, 456 F.2d 608 (6th Cir. 1972); Bright v. Nunn, 448 F.2d 245 (6th Cir. 1971); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971); Valdes v. Black, 446 F.2d 1071 (10th Cir. 1971); *Ex parte* McDonald, 49 Mont. 454, 143 P. 947 (1914); Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 55 A. 952 (1903); Hatfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914); State *ex rel.* Mays v. Brown, 71 W. Va. 519, 77 S.E. 243 (1912).

184. Alabama v. United States, 373 U.S. 545 (1963).

185. 327 U.S. 304 (1946).

military tribunal without the benefit of many due process rights.[186] The Court held martial law could be declared under the statutes, but replacing civilian courts with military tribunals for three years was not justifiable, and this particular use of troops was invalid. The Court cited language in *Sterling* limiting executive discretion in *declaring* an emergency necessitating the use of troops,[187] even though this language, and the language and effect of *Duncan*, spoke of limiting the *use* of military troops and the proclamation in *Duncan* was authorized by Congress in advance.[188] Thus, *Duncan* affected the *use* of troops though it appeared to be ruling on the executive *determination of an exigency*.[189] The Court did state that according to the *Milligan* Doctrine, the proclamation ceases to be effective when the actual threat of hostilities passes.[190] *Duncan* did not clarify or amend guidelines concerning the appropriateness of a proclamation. The decision looks only to the limits on military discretion after a proclamation has been made in face of a legitimate threat, such as the bombing of Pearl Harbor, and it only affects the use of troops.

Other than the misapplication of the *Milligan* Doctrine in *Duncan*, the Doctrine has no contemporary affect; especially since *Sterling* held the executive's determination of an exigency to be conclusive. Several courts have held that a governor has sole discretion to activate troops even though the threat to local government no longer exists.[191] Court decisions indicate that an execu-

186. This continued long after the threat of Hawaii becoming a theatre for World War II had been removed. Duncan and White were two civilians who were arrested on criminal charges and convicted before a military tribunal. They sought a Writ of Habeas Corpus from the Supreme Court.

187. *Id.* at 321 n.18.

189. *See* discussion accompanying note 164 *supra*.

188. *Id.* at 307-08. The Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141 (April 30, 1900) authorized the Territorial Governor to call out troops if necessary to repel invasion, suppress insurrection or protect public safety, and to suspend the Writ of Habeas Corpus and maintain "martial law."

190. 327 U.S. 304, 325-26 (1946).

191. Alabama v. United States, 373 U.S. 545 (1963). In Valdes v. Black, 446 F.2d 1071 (10th Cir. 1971), the court held that the declaration of New Mexico's Governor was not subject to judicial review. The Governor declared martial law and called the National Guard to arrest thirty Spanish-American men, women, and children at a privately owned ranch *after* they had surrendered the county courthouse which they had previously been occupying. The holding in *Valdes* authorizes use of troops not to detain dissenters or to restore order, but rather to punish dissenters for disturbing the peace after order is restored. The court instructed the jury:

> [T]he commander of the Guard may use the measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for pun-

tive can declare an exigency with little or no court interference until after the damage is done.[192] *Scheuer* states only that the court will review the proclamation *after* it is made. Not only are there no standards to determine the appropriateness of a proclamation, but courts have refused to review the executive's determination of an exigency's existence and thus have failed to establish even the vaguest standards.

2. The Power to Use Troops

The second major issue is the executive's use of military troops once an exigency is determined to exist. Courts have limited the use, in theory, to lawful, constitutional orders designed to restore order where there is an actual disorder. Although that limit has been trumpeted frequently after the damage to individual rights has occurred, it has never prevented the infliction of injury. The holdings in *Gilligan* and *Scheuer* have had two effects: first, they have temporarily postponed judicial review of *pre*-damage restraint of executive use of troops, and second, they have upheld *post*-damage judicial review. These decisions have not, however, made such a suit a realistic remedy for the injured citizen.

Gilligan and *Scheuer* have virtually eliminated the possibility of restraining executive use of troops before damage, injury or death occurs. The *Sterling* Doctrine permitted judicial review of the executive's use of troops after his conclusive determination that an emergency existed.[193] The *Sterling* court further held that a governor could be enjoined from using troops if he was seeking to enforce an illegal order or if the use of troops would unduly infringe on the constitutional rights of citizens.[194] Lower court decisions following *Sterling* adhered to this limitation of executive authority, *i.e.*, military troops may not be used to enforce an illegal order.[195] In *Morgan v. Rhodes*,[196] the issues were presented in such a

ishment, but are by way of precaution to prevent the exercise of hostile power.

Id. at 1076. If order is restored before the arrival of troops so that the troops merely arrest individuals, but ignore the constitutional standards which would bind state patrolmen when making the same type of arrest, then the National Guard is acting as a law enforcement agency to assist in punishing individuals for violating laws. *Id.* at 1076-77.

192. *See* discussion accompanying note 193 *infra*.

193. Sterling v. Constantin, 287 U.S. 378, 402-03 (1932).

194. *Sterling* specifically allowed the Governor of Texas to be enjoined in his use of military troops for enforcing an order already enjoined by a federal court as an unlawful confiscation of private property. The executive order for martial law was held not to be a key issue in the case because it was an absolute and conclusive right of the Governor.

195. *See* discussion accompanying note 82 *supra*.

196. 456 F.2d 608 (6th Cir. 1972). *See* Scheuer v. Rhodes, 416 U.S. 232 (1974); *accord*, Sterling v. Constantin, 287 U.S. 378, 398 (1932).

way that the court of appeals had to determine whether executive use of military troops is subject to judicial review. The effect of *Gilligan* (*Morgan v. Rhodes* on appeal to the Supreme Court), however, was to place executive access to military troops beyond judicial review. Thus, if rights are to be protected by a pre-injury injunction, the injunction can only be obtained by attacking the executive's discretion and not the competence of the National Guard.

Scheuer's language makes it nearly impossible to attack executive discretion as a means of obtaining a pre-injury injunction. The power of judicial review over an executive's use of troops was established in *Scheuer*, so that at least the violation of constitutional rights was restored to the *Sterling* Doctrine's position of having a remedy, but under the language of *Scheuer* and *Gilligan*, *pre*-violation protection could not be achieved. *Scheuer* held, quoting the *Sterling* Court, that the requisite standard for judicial review is when "state power *has* overridden private rights secured by that Constitution."[197] The implication is that judicial review cannot be obtained before private rights have actually been overridden, and thus executive discretion to order abusive use of troops is beyond judicial review until injury to persons or rights has occurred. This language is immediately followed by a negative pregnant in which the Court states that *Gilligan* did not place the *conduct* of the National Guard beyond judicial review.[198] *Gilligan* did, however, place the *competence* of the National Guard beyond judicial review. The Court did not answer the question of whether an order not yet obeyed was reviewable. Instead, it limited itself to "conduct" which must have occurred and which must necessarily have infringed private rights to be reviewable. The logical conclusion when *Scheuer* is read with *Sterling* and *Gilligan* is that injury to private rights must have occurred before review will be available.

It appears doubtful that an individual could obtain ex parte a temporary restraining order by showing threatened violation of constitutional rights when troops are used. *Gilligan* placed beyond judicial review the issue of troops being inherently incompetent and dangerous. *Scheuer* logically concludes that to have standing, the individual must be able to prove an injury. *Scheuer* also grants an executive qualified immunity if he can show that he acted in good faith and within the discretion of his office in responding to circumstances as they appeared to him. The standard, according to *Scheuer*, is the *Moyer* Doctrine that an executive's declaration is entitled to great weight. This places a high burden of proof on the plaintiff to show bad faith by the executive—especially since it is his view of circumstances which is relevant and only he has

197. 416 U.S. 232, 249-50.
198. *Id.*, *quoting* Sterling v. Constantin, 287 U.S. 378 (1932).

access to the facts.[199] Thus, the petition would likely be dismissed for failure to maintain averments with evidence and/or because the plaintiff's cause of action is not ripe.

Although a decision in an action to enjoin the use of troops before they are actually deployed is not reviewable, *Scheuer* did not exclude judicial review after constitutional rights had been violated. Before *Scheuer* the courts of appeals were divided on the issue of reviewing troop use, but most courts dismissed suits against the executive, either for lack of jurisdiction or because of governmental immunity.[200]

Scheuer allowed plaintiffs to bring a suit for damages against the governor personally. The eleventh amendment does not apply in a suit against a state official sued in his own name for deprivation of constitutional rights under the color of law.[201] Thus, the governor also has only "qualified immunity." A cause of action arises when there is a substantial showing of state power overriding private rights. In a civil disorder, it will usually be necessary to override some private rights to restore order. The issue is the determination of the point at which the infringement of rights become so gross that it warrants recovery. *Scheuer* permits violation of private rights as long as it is reasonably necessary, in the eyes of the executive, to suppress the disorder.[202] A violation of constitutional rights through use of troops is the only cause of action for which judicial review is available. The violation must be unnecessary to the restoration of order for it to provide the basis for a successful case. The test is subjective—the reasonable appearance of the circumstances as they appear to the executive at the time—in order to avoid retrospective evaluation of the situation by courts.[203] The effect of the test is to necessitate a showing of executive bad faith. The plaintiff has the burden of proof to overcome the "great weight of authority" behind the executive's proclamation.[204] He must show that the executive's view of the

199. *Id.* at 250. The Court adopted this from Moyer v. Peabody, 212 U.S. 78, 85 (1909).

200. In Krause v. Rhodes, 471 F.2d 430 (6th Cir. 1972), and Valdes v. Black, 446 F.2d 1071 (10th Cir. 1971), the executive's use of troops was considered conclusively beyond judicial review. In *Krause*, the Sixth Circuit stated that the opinion in United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), went beyond the executive orders and reviewed the executive's actions but denied recovery. The court also cited Bright v. Nunn, 448 F.2d 245 (6th Cir. 1971) where the court reviewed the executive's order for "bad faith" and dismissed the case on its facts. *See* discussion accompanying notes 214-15 *infra* regarding the decision of cases on facts in the absence of standards of law.

201. Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974).

202. *Id.* at 248-49.

203. *See* discussion accompanying note 199 *supra.*

204. *Id.*

circumstances would not suggest that his orders were reasonably necessary to restore order and were excessive and without good faith.[205]

The individual must also determine the standard for identifying overridden private rights within the context of a civil disorder suppressed by military troops. Several courts of appeals decisions within the last ten years have reached diverse and inconsistent results in determining what constitutes executive bad faith or unreasonable use of military troops. Some have held that the normal standards for criminal due process do not apply to military troops used in a law enforcement capacity.[206] Others have held that due process standards are relaxed, but must be followed at least to some degree.[207] Some courts have allowed denial of the first amendment rights of free speech and assembly to a large group because of the unorganized, rock throwing dissent of a few people.[208] Some authors have gone so far as to suggest that a different set of constitutional rights should be substituted for those normally in operation whenever an executive declares an exigency.[209] In *Chalk v. United States*,[210] the United States Court of Appeals for the Fourth Circuit stated that the court should determine whether a reasonable man operating under the facts known to the executive would consider the restrictions to be necessary for the preservation of order. The problem most courts face is that in a time of civil disorder, the normal criminal procedures protecting various due process rights are impossible to observe in the midst of massive chaos and large numbers of dissenters.[211] The Supreme Court has left unanswered the question of what constitutes a violation of a private right in an exigency. The plaintiff can never be certain whether the facts he is presenting will constitute a sufficient cause of action to warrant recovery.

The individual citizen's burden of proof is further complicated by executive privilege which usually operates to deny the plaintiff acccess to available evidence.[212] Once troops are deployed, the plaintiff's evidence is usually in the hands of the military. Thus, if the executive acts in bad faith, he will have principal control of the area, people, and evidence involved and usually will be the only informed source of facts surrounding the disorder. Most discov-

205. 416 U.S. 232 (1974).
206. Valdes v. Black, 446 F.2d 1071 (10th Cir. 1971).
207. Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973).
208. Bright v. Nunn, 448 F.2d 245 (6th Cir. 1971).
209. *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).
210. 441 F.2d 1277 (4th Cir. 1971).
211. *See, e.g.*, Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973).
212. *See* discussion accompanying notes 133-35 *supra*.

ery procedures will not yet be available because the plaintiff may not have enough information to file a complaint stating a cause of action. Even if discovery procedures were available, the evidence might be classified—often on the grounds that it might incite further disorder, tip-off criminal defendants concerning the government's case or "threaten national security." The plaintiff is thus faced with the task of forcing an executive acting in bad faith to reveal evidence damaging to himself so that the executive may be sued at a time when the plaintiff is uncertain of the evidential substance.[213]

If the plaintiff should obtain a judgment for damages or injunctive and declaratory relief against the executive, the problem of obtaining execution remains. The issue has never been crucial because executives have been relenting in all cases, though in some a minor confrontation occurred first.[214] It is a struggle of the court's justice versus the executive's military might, and to date presidents have realized more would be gained by relenting than by forcing a confrontation.

The fact remains that the chief executive can use any measures he deems necessary to suppress civil disorders.[215] If the result is a derogation of fundamental rights, the issue is whether the facts support a finding that executive action was necessary. Courts will intervene, but only to review the facts in order to establish the reasonableness of the actions taken in a *particular* case. They do not decide cases on the basis of principles. Thus, the appearance of a judicial review as a limit on executive military power may become a facade.[216] A commander can do almost anything in chaos

213. In *Ex parte* Merryman, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1862), Chief Justice Taney issued a Writ of Habeas Corpus and Coram Nobis to the commanding general of the union army prison camp to produce Merryman before the court. When the marshall appeared at the gate of the camp, he was refused entrance and the general refused to comply with the Writ on the grounds that President Lincoln had suspended the Writ of Habeas Corpus. Taney allowed litigation on this issue without attempting to enforce the Writ with a posse because he recognized the futility of a marshall posse against an army. The President refused to release Merryman immediately, contending the President had the power to suspend the Writ of Habeas Corpus. Merryman was later released and turned over to civil authorities. *See* Maj. Robert M. McDonough, *Furnishing Federal Military Aid to Civil Authorities* (Thesis, Judge Advocate General's School, May 1956); CUSHMAN & CUSHMAN, CASES IN CONSTITUTIONAL LAW 151 (3rd Ed. 1968).

214. Sterling v. Constantin, 287 U.S. 378 (1932), also involved a court order. The Supreme Court ordered the governor to observe a lawful injunction and the governor yielded. Both these cases, however, illustrate that an executive is limited only by a desire to preserve his own integrity and that of the court.

215. McGonagle, *supra* note 78 at 232.

216. Mutter *supra* note 150 at 62.

and later establish justifying facts.

Judicial review of both executive proclamations of emergencies and executive use of troops domestically has been vague and inconsistent in limiting executive discretion. The courts have not limited the chief executive because they have failed to provide consistent guidelines for executive action and have shielded the executive and the military from the public. The courts cannot limit the President as effectively as Congress, but they can establish directives to prevent wholesale infringement of personal freedoms in the name of national security. Most significantly, the courts have not provided a means of preventing infringement upon personal freedoms before they occur; they cannot guarantee the preservation of civil liberties, but instead, offer only a post-injury remedy —if the courts survive the imposition of martial law.

III. THE CONSEQUENCES

The executive has virtually unlimited discretion in his power to use military troops domestically. Weak, vague and incomplete statutes have effectively removed most congressional participation in those decisions. The executive branch has subtly expanded power delegated by Congress and established detailed programs for domestic military deployment. The judiciary remains ineffective either in establishing clear legal limits for using military power in civil disorders or in guaranteeing civil liberties in the event that martial law was declared. The irony of this present state of the law is that new proposals attempt to remove even the facade of limitations rather than providing more substance.[217]

The accumulation of such power in the hands of one official could result in substantial harm to our constitutional democracy. Before effective limits can be developed, the advantages and disadvantages of concentrating this power must be weighed. The problem if left unsolved becomes less theoretical and more real as society becomes more complex—the foundations for an American dictatorship are lying dormant behind the personal integrity of whomever is President. Once deployed, a military structure, unless self-restrained, would overwhelm the populace.

217. The National Guard Association met in Puerto Rico on September 23, 1974, and proposed new legislation authorizing the President or the Secretary of Defense to mobilize guard-reserve units totaling up to 50,000 men at *any* one time for a maximum of 90 days without a formal proclamation of emergency. The aim is to use volunteers for smaller emergencies whenever and wherever possible. Present plans contemplate making National Guard and reserve units integral parts of regular Army divisions for the first time. Lincoln Journal, Sept. 24, 1974.

A. Theories of Power

The issue becomes how, and more fundamentally whether, the laws should be changed to place effective limits on executive power without destroying it. The interests of those advocating and opposing limitations are considerations to be integrated into any statutory reform scheme to provide a better balance of military power in the three branches of the federal government.

The interests to be considered begin with an examination of the soldier's role in the civil setting. The military's civil function should deviate significantly in its ends and means from its principal mission in combat.[218] The soldier is trained only for combat, a role entirely different than the one played in civil disorders.[219] The mere presence of troops in the highly emotional setting of a civil disorder often precipitates violence.[220] Because of their training, discipline and equipment, military personnel are inherently able to dominate the rest of society.[221] The answer to limiting executive action does not lie in a popular uprising because it would have little, if any, chance of succeeding in a violent military confrontation.

In previously discussed historical instances,[222] English kings

218. *See* Mutter, *supra* note 150. *See also Lectures on Martial Law*, DEP'T OF ARMY PAMPHLET, Jan., 1956.

219. National Guardsmen received thirty-three hours of training for civil disorders in 1967 and this was later cut back to sixteen hours. *See* CAMPUS UNREST, *supra* note 152, ch. 5 at 44. They are equipped for combat. *Id.* at 45-51. These training standards are established by the Department of Defense and the states can adopt them or lose federal funding which constitutes approximately 90 per cent of most state National Guard budgets. *See* CIVIL DISORDERS, *supra* note 13 at 497-98. The National Guard and Army lack the middle ground between a display of force greater than local law enforcement and the combative force less than the lethal capability required to meet large foreign powers. *Id.* at 502. The Army has developed seven special task forces of brigade size, *id.* at 506-08, which were used to disperse riots. *Id.* at 95. Their effectiveness then and now is not totally resolved. Improvements are needed to handle civil unrest, *see* CAMPUS UNREST, ch. 5 at 43-52; CIVIL DISORDERS at 508-10, and also CIVIL DISASTERS. *See* CIVIL DISORDERS at 522. In spite of these facts, the National Guard was used 221 times in civil defense and never in foreign warfare (Vietnam War) between 1967 and 1970. CAMPUS UNREST ch. 5 at 43. From 1945 to 1968, the National Guard was used 100 times domestically, eighteen times in the summer of 1967. CIVIL DISORDERS at 497.

220. The Kent State tragedy is an instance where military troops in a civil disorder only increased tensions until the troops finally reacted as they had been trained to do. *See* DAVIES REPORT, *supra* note 1 at 26845. *See also* CAMPUS UNREST, *supra* note 152, ch. 4 at 56, and ch. 5 at 44-45, 50-51. *Compare*, R. FOGELSON, VIOLENCE AS PROTEST: A STUDY OF RIOTS AND GHETTOS 53 (1971).

221. *See* discussion accompanying note 150 *supra.*

222. *See* discussion accompanying note 14 *supra.*

used force to subdue the population and to ensure their arbitrary and absolute sovereignty. Parliament gradually displaced the arbitrariness with the "Rule of Law" which the American system inherited and established in the Constitution.[223] The Rule of Law concept recognizes that a consistent standard of law must exist, both with respect to substance and procedure, which guarantees the fundamental rights of the citizens. It embraces social principles, rather than an individual or power, as the foundation of government. An individual's power can be limited by subordinating it to the higher authority of principles and providing for the removal of individual power, if it is abused.

For a society to survive and grow, its citizens must devise new insights by reflecting upon their past experiences. This process demands the interaction and communication of individual values which generate common social values and a Rule of Law. The Constitution has preserved this reflective process. Expression is protected from government encroachment in the first amendment; equal protection demands that laws pursue values and policies rather than individuals; and due process requires certainty in the legal process affecting individual lives. These constitutional protections are the present Rule of Law. The Constitution provides no exception to these protections in the event of necessity or in using troops.

The Constitution divides power among three branches of government and provides a system of checks and balances to prevent a particular branch from becoming so powerful that it could destroy democracy and individual freedom.[224] Constitutional drafters realized that more was needed to protect freedom than the personal integrity of a successful politician.[225] "This nation, as experience has proved, cannot always remain at peace and has no right to expect that it will always have wise and human rulers, sincerely attached to principles of the Constitution."[226] The three branches of government are limited to powers specified and granted to them by the Constitution.[227] The Court in *Ex parte Milligan* explained the role of the President:

> Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln;[228] and if this right is conceded, and the calamities of

223. *See* Mutter, *supra* note 150 at 60.
224. *See Ex parte* Merryman, 17 F. Cas. 144, 149-50 (No. 9,487) (C.C.D. Md. 1861), Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911).
225. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
226. *Id.* at 125.
227. *Ex parte* Merryman, 17 F. Cas. 144 (No. 9,487) (C.C.D. Md. 1861).
228. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866). These remarks on presidential limitations were directed at President Lincoln. Thus,

> war again befall us, the dangers to human liberty are frightful to contemplate. . . . They knew—the history of the world told them . . . that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation.[229]

The intent of the framers of the Constitution was to limit presidential power by subordinating it to judicial authority. The personal integrity of an individual President is not a sufficient limitation on his power.

> The only power . . . which the President possesses, where life, liberty or property of a private citizen is concerned, is the power and duty presented in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution. It is, thus, made his duty to come to the aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power, he acts in subordination to judicial authority, assisting it to execute its process and enforcing its judgments.[230]

The only exception allowed in the face of necessity is the suspension of a Writ of Habeas Corpus until civil courts are reopened.[231] The practical meaning of this exception is that individuals can be detained until the exigency is over. To arrest and prosecute individuals, all due process rights are to be retained and followed in civil courts if they are open.[232] Although Milligan was initially arrested for assembling with pro-Confederates, the *Milligan* Court did not discuss the possibility of restricting free speech.[233] The use of military troops to restrict first amendment rights of speech and assembly has the effect of furthering political values rather than protecting people and property.

The concept of a Rule of Law should allow a President only enough discretion to restore order without infringing on civil liberties. The argument for allowing an exception to the superiority of the Rule of Law is the "Principle of Necessity" which would jus-

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even this "wise and humane ruler" needed to be restricted. *See* discussion accompanying note 178 *supra*. This decision was written about twenty months after Lincoln's assassination.

229. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866). These opinions were written during the largest insurrection in the nation's history.
230. *Ex parte* Merryman, 17 F. Cas. 144, 149 (No. 9487) (C.C.D. Md. 1862).
231. *Id.* at 125-26.
232. *See* McGonagle, *supra* note 150 at 61.
233. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 6-7 (1866).

tify placing all military power in the hands of the executive.[234] Under this concept, the executive may take any action necessary to safeguard the state from insurrection.[235] The government is viewed as having an indispensible right of self-preservation which is jeopardized by insurrectionists.[236] The Constitution charges the President with the duty of guaranteeing a republican form of government to all states,[237] and gives him discretion in deciding what is necessary to enforce the laws of the United States. The discretion is most effective if exercised by one man elected by the public because in an emergency situation, he can act rapidly. To allow free and uninhibited discretion, courts do not review presidential decisions because then the discretion would ultimately be with the courts who would be viewing executive decisions retrospectively.[238] The government has an irrebuttable right to use military force to protect itself because the purpose of the military is to support civil administration of liberty by ending disorders obstructing the normal operations of the administration, whether the obstruction was foreign or domestic.[239] Martial law is viewed as a substitution for civil law when the constitutional guarantees are destroyed by dissenters.[240] The President may substitute military control for civil authority and a system of constitutional rights if he believes this is necessary to restore order.[241] The *Moyer* Doctrine held that in balancing the rights of individuals against the right of the government to protect itself, the government had the right to survive, and individuals' rights were secondary. Chief Justice Holmes stated that the government has the right to kill or seize bodies if necessary to prevent hostilities as long as it is done in good faith and with the honest belief that the facts warranted this action.[242] The only limitation on executive authority is that there must first be an insurrection.[243] The requisites necessary to determine whether

234. *See* Mutter, *supra* note 150 at 61.
235. WEINER, THE LAW OF MARTIAL LAW 16 (1930); *accord*, Mutter, *supra* note 150 at 61.
236. State *ex rel.* Mays v. Brown, 71 W. Va. 519, 520-24, 77 S.E. 243, 244-45 (1912); Moyer v. Peabody, 212 U.S. 78, 85 (1909).
237. *Compare*, State *ex rel.* Mays v. Brown, 71 W. Va. 519, 77 S.E. 243 (1912); Moyer v. Peabody, 212 U.S. 78 (1909); *see also* U.S. CONST. art. IV, § 4.
238. State *ex rel.* Mays v. Brown, 71 W. Va. 519, 524-25, 77 S.E. 243, 246 (1912); Hatfield v. Graham, 73 W. Va. 759, 765-69, 81 S.E. 533, 535-36 (1914).
239. *See* WEINER *supra* note 235 at 15; *accord*, Mutter, *supra* note 150 at 61.
240. State *ex rel.* Mays v. Brown, 71 W. Va. 519, 524, 77 S.E. 243, 245 (1912); Hatfield v. Graham, 73 W. Va. 759, 766-67, 81 S.E. 533, 536 (1914); Moyer v. Peabody, 212 U.S. 78, 85 (1909).
241. *See* WEINER, *supra* note 235 at 60; *accord*, Mutter, *supra* note 150 at 61.
242. Moyer v. Peabody, 212 U.S. 78, 84-86 (1909).
243. *Id.* at 85-86.

an insurrection exists were never clarified because the executive's decision was conclusive on that point. Thus the concept's application resulted in eliminating effective limitations because there were no procedures for enforcing those limitations.[244]

The executive's discretion should be limited without inhibiting his effectiveness. This is possible if pre-arranged methods of operation incorporate a cognizance and observance of those limits. The limits can only be enforced if the executive's discretion can be reviewed. The *Sterling* and *Scheuer* decisions reviewed the use of troops and declaration of an emergency respectively.[245] The duty to execute laws under the Constitution cannot be interpreted to allow the executive to implement martial law, and thereby place himself at the head of an autocracy supplanting the Constitution.[246]

B. Recommendations

The Principle of Necessity need not concern itself with ensuring individual rights even before a declaration of martial law is made because the dedicated advocate of the theory does not believe the executive's discretion should be limited in any way regarding an emergency.[247] Nevertheless, this persists as one of the most substantial dangers in the present laws regarding the domestic use of troops.

The Rule of Law Doctrine attempts to maintain a higher law to which the government is always subordinated. The Principle of Necessity Doctrine on the other hand, attempts to maintain government by giving an executive enough discretion to deal freely and

244. In State *ex rel.* Mays v. Brown, 71 W. Va. 519, 77 S.E. 243 (1912), the two defendants were arrested during the peaceful lull following the suppression of an insurrection. Martial law was declared and was upheld, along with the defendants' conviction without due process rights even though there was no disorder at the time of arrest. In Hatfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914), the publisher of the Socialist Printing Company sued Governor Hatfield of West Virginia for conspiring to destroy the publisher's printing office. Hatfield sought a writ of prohibition against Judge Graham for entertaining the suit. The Supreme Court of the United States upheld the decision granting the writ even though the publishing office was in a county outside the area of disorder and even though the publisher's only relation to the disorder was that he published materials favoring the position of the dissenters.

245. *See* Mutter, *supra* note 150 at 61; discussions accompanying notes 159-65, 195, and 171-76, 196-205 *supra.*

246. *See* McGonagle, *supra* note 78 at 232.

247. *See* Mutter, *supra* note 150 at 61; WEINER *supra* note 235 at 16. There are substantial issues involving the debate over whether civil disobedience is ever justified—an issue beyond the scope of this Comment. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

effectively with any foreign or domestic threat. Any reforms should incorporate concepts from these two doctrines by providing an executive with discretion that is effectively limited by legislative definitions, controlled by active legislative and judicial involvement and restrained by pre- and post-injury statutory injunctions. The current constraint consists primarily of presidential trust and good faith. The general theme of all reform in this area must be a redistribution of power relating to the use of military troops so that the President is checked by the legislature and the courts but retains the power to choose between several statutory alternatives of limited scope, duration, and control.

The need for statutory definitions includes revising chapter fifteen of Title 10 of the United States Code to include definitions of such terms as a civil disorder necessitating the use of the militia. Guidelines must be established to determine when a threat to local authorities and local law enforcement becomes so substantial that troops are needed to control the situation.[248] When troops are deployed, statutory standards should be established regarding the proper use of the troops. They should be directed constantly to support and protect local, state, and national government operations when obstructed. An explicit statute should prohibit closing a court or adjourning a local, state or national legislative body.[249] Upon restoration of local government authority, even at a minimal level, local authorities should be able to establish objectives which can be carried out by the military with minimal disruption to people, property, and government.[250]

Local authorities should be kept constantly informed on developments.[251] The military should be subjected to the same constitutional standards of law enforcement and should observe the same local, state, and national laws as local authorities. This should include explicit provisions for protecting first amendment rights to assemble, speak, print, and demonstrate peaceably (or even profanely and vociferously) as long as people, property and vital access areas are protected. It is only when weapons are used, individuals are assaulted, or property is trespassed on and converted beyond the control of local law enforcement that troops should be de-

248. The reasoning and holding in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), provides a starting point for devising such a statutory definition.

249. The Constitution requires the Congress to meet once a year. U.S. CONST. art. I, § 4, and to adjourn on agreement of both houses. *Id.* § 5. It allows the President to adjourn Congress only when the two Houses cannot agree on adjournment. But even then he can only adjourn Congress until a later time and not indefinitely. Id. § 3.

250. *See* CAMPUS UNREST, *supra* note 152, ch. 5 at 52-53.

251. *Id.* at 53.

ployed—and then only to protect people and property and to disarm the dissenters.[252] Arrests made during this period should provide full due process rights or they should not be made at all.

The only exception to requiring procedural due process for arrest during this period is the temporary suspension of the Writ of Habeas Corpus. This would allow persons to be detained for a period of time without arrest or prosecution to allow the situation to stabilize. Because the Writ remains but its exercise is postponed, statutory guidelines must be established specifying a maximum period of detention without prosecution. If charges are not brought, any damages to the individual should be paid by the government upon proof of loss.

The legislative and judicial involvement in the deployment of troops can be achieved by adopting legislation which automatically initiates legislative investigation of the causes of the disorder as well as the need for using troops. The executive proclamation of an emergency necessitating the use of troops would trigger the investigation but the executive would still have the discretion to make the proclamation. The investigation could examine the executive's good faith and provide a coherent study of the causes of the dissent which would alleviate one of the major causes of civil disorders—the inability to reform conditions and the lack of a forum to release tensions.[253] This means that the motivations of both the executive and the dissenters, as well as the circumstances of the disorder, would have to be investigated and the congressional committee would necessarily to have access to *all* military data obtained during the disorder.

An alternative would be for Congress to impose the same limits on domestic use of troops by the President as imposed on the foreign use of troops in the War Resolution.[254] Troops could be deployed only after a proclamation to rioters to cease their actions and retire peaceably.[255] The proclamation would trigger a full re-

252. A lesser standard would allow the troops to disperse the crowd because of the subject of their dissent. This borders on authorized political oppression.

253. *See* CAMPUS UNREST, *supra* note 152; R. FOGELSON, VIOLENCE AS PROTEST: A STUDY OF RIOTS AND GHETTOS 53 (1971). These incidents illustrate that such an investigation can be very useful in preventing violence and bad faith and abuse of executive power as well as in drafting a course of action to remedy the cause of such disturbances.

254. In urban areas, the absence of property insurance to protect against riot loss is more pronounced according to the Advisory Commission on Civil Disorders. CIVIL DISORDERS, *supra* note 13 at 360-62. Because many factors other than riots make it difficult to provide such coverage, federal loans ought to be made available in specific instances where private individuals are without private insurance.

255. This would necessitate amending 10 U.S.C. § 334 (1970) by removing

port to Congress within 48 hours of the circumstances necessitating the use of troops. Both the proclamation and the report would require congressional ratification as soon as possible.

Because the populace could not effectively oppose a monolithic military force under the control of a despotic executive, to preserve the above described limitations, command ties between officers and their subordinates would have to be broken if an overreaching order were given. This means that the statutory limit must be made explicitly clear so that those responsible for implementing orders recognize a violation of the first amendment or due process. Also procedures must be established to comply with those limitations so that breach of the routine is the only instance where a soldier needs to be suspicious. Finally, criminal sanctions must be imposed for obeying an order which exceeds statutory limits.[256] A soldier in a *domestic* setting who is uncertain about the legality of an order should have the right to refuse obedience until the legality of the order is clarified in court. For any of these suggested reforms to be effective, there must be a procedure for breaking up the command structure and making individuals responsible for their own acts.

At the stage of a civil disorder where a soldier suspects the legality of his order, the judicial process would be more appropriate than legislative or administrative processes for issuing efficient orders to restrict deployment of troops or to stop their improper use.[257] Statutory authority would provide the courts with express power to grant a restraining order or injunction, thus removing ambiguity in the minds of judges concerning the court's jurisdiction.[258] This would also indicate to the executive that the Congress politically and financially supports subjecting executive orders to

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the words "under this chapter," thus making it applicable in all instances where troops are deployed rather than only those instances arising under chapter fifteen.

256. The present status of criminal liability regarding soldiers is that the order must be illegal on its face in order to convict the soldier. Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 55 A. 952 (1903); United States v. Whatley, 20 C.M.R. 614 (ACM 10448, 1955); United States v. Kinder, 14 C.M.R. 742 (ACM 7321, 1954).

257. The military have acted on orders from the courts in both Shay's Rebellion of 1786 and the Whiskey Rebellion of 1794. A judge accompanied the troops in the field to issue warrants during the Whiskey Rebellion. Comment, *supra* note 117 at 216. *See* Note, *Rule by Martial Law in Indiana: The Scope of Executive Power*, 31 IND. L.J. 456, 468 (1956).

258. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 309-418 (2d ed. 1973).

the courts to decide if he acted within statutory limitations. The statute should provide for enjoining the use of troops to infringe on an individual's constitutional rights if it can be shown that the risk of destruction is substantial or abusive. The injunction would have to be applicable to deployment of troops as well. Its effect would be to nullify the officer's orders and hold a soldier obeying the order in criminal contempt and make him civilly liable for damage or injury to individual citizens which occurred as a result of his actions. An injunction would be one attempt at guaranteeing the individual his rights before and during the time of the troop deployment.

Finally, legislation should be enacted to compensate civilians who have been injured or have had property damaged as a result of military action. Since most liability insurers will not cover such losses[259] the government should adopt an approach whereby the government can take whatever action it believes necessary to avert the crisis, but must compensate those damaged.[260] A scheme of compensation and loans to riot victims, particularly when federal military tactics contribute to the destruction, should be developed with specific provisions being put forth in the congressional ratification of presidential actions.

259. The National Advisory Commission on Civil Disorders noted the unavailability of insurance in center city areas. A special panel was called to investigate the problem and proposed a five-part program, based on a cooperative effort between the insurance industry and federal and state governments, to assure the availability of property insurance. *See* CIVIL DISORDERS, *supra* note 13 at 360-62.

260. *See, e.g.*, Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908), where the court held that an individual in times of necessity may protect himself at the expense of another's property and the landowner does not have the privilege to resist or expel the intruder. In Vincent v. Lake Erie Transportation, 109 Minn. 456, 124 N.W. 221 (1910), the court allowed a landowner to later obtain compensation for damage resulting from an intrusion. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 24 (4th ed. 1971). Some countries such as Great Britain have passed acts of indemnity on occasion to provide the civilians with funds to cover their losses and to eliminate large judgments after a civil disorder against soldiers who cannot pay them. C. FAIRMAN, THE LAW OF MARTIAL RULE 207-09 (1930). This has not been the general practice in the United States except for the Civil War. W. WINTHROP, MILITARY LAW AND PRECEDENTS 830 (2d ed. 1920 reprint). Maintaining strict criminal liability of soldiers for carrying out patently unlawful orders and ultra vires acts would still operate as a deterrant. *Compare* 28 U.S.C. § 2680(h). *See* Bates v. Clark, 95 U.S. 204 (1877); *cf.* Milligan v. Hovey, 17 Fed. Cas. 380 (No. 9,605) (C.C.D. Ind. 1871); McCall v. McDowell, 15 Fed. Cas. 1235 (No. 8,673) (C.C.D. Cal. 1867); Fluke v. Canton, 31 Okla. 718, 123 P. 1049 (1912). *But see* Bishop v. Vandercook, 228 Mich. 229, 200 N.W. 278 (1924); Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911).

These suggested alternatives are directed toward the preservation of both order and freedom. When necessary, force can be used, if properly limited. It is fallacious to refuse to limit power before the circumstances necessitating a decision arise. To allow a spontaneous decision unlimited in scope, and consequently indifferent to social interests, may provide order but at a very substantial risk to the primary objective of preserving laws regarding freedom. To make the state's existence superior to the rights of the individuals comprising society and to give those individuals functioning in the name of government unlimited power is tyranny, because the concept places human rights in the hands of a few. It fails to realize the true foundation of human rights lies in the dignity of reason inherently necessary to the evolution of man within his society and a necessary result of man's reflective self.[261]

C. The Danger

Presently power concerning the domestic use of troops lies with the President. A description of the process of instituting martial law on a nationwide basis for the purpose of removing political dissent will illustrate the significance of this concentrated power.

Since the President's integrity and character are the only restraints on his discretion to use military power, this power might be used for political purposes.[262] The mood of the President and his staff and the interrelationship between the executive and the staff play an important role in decisions concerning political dissent and civil disorder. Much power can be delegated to the executive staff who can perpetrate an autocracy by controlling information flowing to the executive and by exercising discretion in implementing executive orders.[263] The executive may also manipu-

261. *See* CAMPUS UNREST, *supra* note 152, ch. 2 at 1-63, especially 7-8 and 37-46.

262. *See* McGonagle, *supra* note 78 at 231; *see* discussion accompanying note 111 *supra*.

263. Presidential adviser John Dean III testified before a select committee on presidential campaign activities that his attempts to restrain the White House from interfering with tactical decisions regarding demonstrations were sometimes superceded by John Ehrlichman and Robert Haldeman, advisers to then President Nixon.

> Sometimes they so instructed me to inform the Justice Department or Chief Wilson of the Metropolitan Police and sometimes Mr. Ehrlichman would so inform Justice or the Chief himself. . . .
>
> I also received frequent complaints regarding the quality of the available information, despite the fact that I felt the White House had the best information available to the government.
>
> I became directly and personally aware of the President's own interest in my reports regarding demonstrations when he called me during a demonstration of the Vietnam Veterans

late staff members by revealing partial details to avoid the staff members' private moral inhibitions. Because of the power the executive maintains over the staff, his analysis will usually prevail,[264] and in the case of a highly motivated President individual rights could be suppressed.[265]

If the executive believed that resort to martial law was necessary to preserve the nation, the proclamation deploying troops would not be subject to legal or practical restraints. Most of the constitutional power of Congress has been delegated to the President, and has been expanded through a process of executive interpretation.[266] The military high command, if they refused to obey orders to assume control,[267] could limit presidential power. They would be in a position, however, of choosing between probable court martial for disobeying orders and the relative safety provided by immunity statutes, even if their conduct violated constitutional rights, if it could be shown that the action taken was reasonable from their viewpoint.[268]

Because the soldier lacks the complete and accurate data of the

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> Against the War which occurred on the Mall in front of the Capitol. This was the occasion in May, 1971 . . . when the government first sought to enjoin the demonstration and later backed down. The President called me for a first-hand report during the demonstration and expressed his concern that I keep him abreast of what was occurring. Accordingly, we prepared hourly status reports and sent them to the President.

Hearings on the Watergate Investigation Before the Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess., Vol. III (June 25, 26, 1973) [hereinafter cited as *Watergate Hearings*].

264. John Dean testified:

> I was made aware of the President's strong feelings about even the smallest of demonstrations during late winter of 1971, when the President's dissatisfaction with a lone dissenter in view of his window resulted in the man who was going to be "removed" by "thugs" being convinced to move out of view.

Dean testified further:

> I learned a major part of any Presidential trip advance operation was insuring that demonstrators were unseen and unheard by the President . . . .
>
> I learned that any means—legal or illegal—were authorized by Mr. Haldeman to deal with demonstrators when the President was traveling or appearing someplace.

Id. at 917-18.

265. John Dean alleged that the President had personally assigned Tom Huston to work on a security project involving the FBI and former Director Hoover in electronic surveillance and penetrations, mail coverage, surreptitious entry, monitoring campus activists, using military undercover agents and coordination of domestic intelligence operations. *Id.* at 1060-65. Dean presented exhibits of the plan along with related memoranda to the Committee. *Id.* at 1319, Exhibit 35.

266. *See* discussion accompanying notes 122-27 *supra.*

267. *See* discussion accompanying notes 255-57 *supra.*

268. *See* discussion accompanying note 151 *supra.*

Pentagon commanders,[269] his limited knowledge may act as a catalyst in aggravating the situation. As the level of dissent increases, a solidified military response will appear more appropriate to soldiers and commanders.[270] If this action-reaction process continues, what may have begun as a political dissent could approach the level of an insurrection.[271]

If the President responded to the situation by deploying troops (on the premise that such action was necessary to the nation's security), congressional interference would be a possibility. In the first instance, a distorted picture of the situation could be presented to Congress by controlling the release of information. Congressional suspicion could be met by deploying troops as law enforcement officers to deal with dissenters in the Capitol,[272] and Congress could be adjourned. Congress would be legally and physically powerless to respond. Further, the news media could be controlled through censorship to eliminate it as a forum for dissent.[273] Ultimately, dissenting congressional leaders could be falsely associated with the disorder.[274]

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269. *See* discussion accompanying notes 126-28, 132 *supra*.
270. *See* discussion accompanying note 139 *supra*. *Cf.* CAMPUS UNREST, *supra* note 152, ch. 3 at 53-56, ch. 4 at 5-9, ch. 5 at 3-4 and 45; FOGELSON, *supra* note 253 at 78. *See, e.g.*, DAVIES REPORT, *supra* note at 26843, col. 1.
271. *See* discussion accompanying note 219 *supra*.
272. *See, e.g.* Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973) and discussion accompanying note 263, *supra*.
273. *See* discussion accompanying note 219; *see also* Addendum A and note 285 *infra*.
274. John Dean testified:

> I stated earlier that there was a continuing dissatisfaction with the available intelligence reports. The most frequent critic was Mr. Haldeman, but the President himself discussed this with me in early March of this year, as a part of the planned counteroffensive for dealing with the Senate Watergate investigation. The President wanted to show that his opponents had employed demonstrators against him during his reelection campaign. However, with each demonstration that the President was confronted with, and each incident that occurred during the campaign, my office had sought to determine if it had in fact been instigated by political opponents of the President—Senator McGovern, the Democratic Party, or whomever. We never found a scintilla of viable evidence indicating that these demonstrators were part of a master plan; nor that they were funded by the Democratic political funds; nor that they had any direct connection with the McGovern campaign. This was explained to Mr. Haldeman, but the President believed that the opposite was, in fact, true. I have submitted to the committee the text of the President's memorandum to me on the subject.

Watergate Hearings, supra note 263 at 918. *See also id.* at 1100, Exhibit 34-1 (Memo from President Nixon to John Dean stating that more information linking McGovern to demonstrations must be obtained).

The courts would have the power to enjoin presidential action only if a constitutional right had been unnecessarily infringed. There is no precedent for pre-infringement review to obtain an injunction, and after *Gilligan v. Morgan*[275] it appears that this approach is not likely to be altered in the near future. Ultimately, the courts could be closed (without violating precedent or statute) to eliminate any possibility of obtaining an injunction.[276] Even if the courts remained open, a President could prevail merely on a showing that his view of the facts was reasonable.[277]

If martial law was declared on a national scale, two likely results would be the suspension of the Writ of Habeas Corpus and a suppression of the first amendment rights of speech and association.[278] Suspension of Habeas Corpus would probably be necessary to maintain order, and mere detention, without formal arrest, is an extremely effective riot control device.[279] Dissenters could be detained indefinitely, possibly in existing concentration camps,[280] charged and summarily convicted either by a judge or court-martial.[281]

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275. *See* discussion of Gilligan v. Morgan, *supra* at note 167.
276. *See* discussion of Duncan v. Kahanamoku, *supra* at notes 186-90.
277. *See* discussion of Scheuer v. Rhodes, *supra* at note 205.
278. Bright v. Nunn, 448 F.2d 245 (Cir. 1971), upheld the right of a governor and campus president to prohibit demonstrations. The prohibition applied to the entire campus of Kentucky University, though only a part of the campus and a few students were involved in a disorder.
279. *See Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972); *see also* discussion accompanying note 142-49 *supra.*
280. *See* discussion accompanying note 139 *supra.* In Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court held that persons suspected of sabotage could be detained in concentration camps without trial, due process, or actual evidence. In *Ex parte* Mitsuye, 323 U.S. 283 (1944), however, the Court said that once loyalty was determined, those detained should be released. *See McGonagle, supra* note 78 at 225. Although the EDA was repealed in 1971, Act of Sept. 25, 1971 Pub. L. No. 92-128 § 2(2), 85 Stat. 348, the repeal did not eliminate the actual facilities and some have alleged that they are still maintained by the federal government. *See* discussion accompanying note 139 *supra.* In his testimony at the Watergate Hearings John Dean alleged that Gordon Liddy had been involved in some activities concerning the possible detention of dissenters. Dean stated that Liddy "explained that the mugging squads could, for example, rough up demonstrators that were causing problems. The kidnapping teams could remove demonstration leaders and take them below the Mexican border and thereby diminish the ability of the demonstrators to cause problems at the San Diego convention. *Watergate Hearings, supra* note 274 at 929.
281. *See* discussion accompanying notes 142-46 *supra. See also Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), Duncan v. Kahanamoku, 327 U.S.

If military operations are directed at political dissenters, infringement of first amendment rights would surely follow. The "clear and present danger" doctrine[282] could be perverted to include whatever was deemed a clear and present danger from the executive's viewpoint.[283] In addition to controlling the only reliable sources of information, censorship by the military of material which the executive views as dangerously sympathetic to dissidents has historical precedent.[284] Further, restraints on association and invasions of privacy through electronic surveillance, mail coverage and surreptitious entry would be unrestrained during a period of martial law.[285]

Some have gone beyond describing the threat of military dictatorship in the United States in hypothetical terms.[286] Indeed,

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304 (1946). These decisions would be applicable only after the detention had taken place and assuming that the Writ of Habeas Corpus was available, and assuming further that the courts were open.

282. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1918).

283. *See* discussion accompanying notes 123-26 *supra.*

284. In Hatfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914), the West Virginia Supreme Court upheld the destruction of an editor's printing office in the county next to the county experiencing riots because the contents of the editor's newspaper were felt to favor the dissenters.

285. *See* discussion accompanying note 265 *supra.*

286. In the August, 1970 edition of a short-lived periodical entitled *Scanlan's* a memorandum appeared allegedly linking Vice President Agnew's office with plans to cancel the 1972 national election and repeal the Bill of Rights. James M. Naughton, in a New York Times article, reported the soon to be published *Scanlan's* memorandum. Naughton reported:

> According to the memorandum, the Rand Corporation, a California research company, agreed to a "judicious leak" of a study on cancellation of the election but did not feel that any information should be made public on a plan for repeal of the Bill of Rights.
>
> The document also contains paragraphs implying that the Nixon Administration, using funds of the Central Intelligence Agency, would inspire demonstrations in support of the President's Indochina policies by construction workers in New York, Pittsburgh, Chicago, Saint Louis, and Seattle.
>
> The memorandum on stationery with the heading "The Vice President," is dated March 11. Rumors were heard in April and spread quickly across the country that the Rand Corporation was preparing a secret study on the implications of cancellation of the 1972 election.
>
> The White House and officials of the California company have repeatedly denied that any such study was ever undertaken or contemplated.
>
> Mr. Agnew said . . . the document . . . was "completely false."
>
> Mr. Zion said that . . . it had come to him from a source who had never misled him in the past. . . .

during the days preceeding President Nixon's resignation, concern for the constitutional process extended to the cabinet. Secretary of Defense, James R. Schlesinger, and Secretary of State, Henry Kissinger, had all orders closely monitored to determine their source because of a concern that a White House order for the domestic deployment of troops might be given directly to a military unit.

> There were two major areas of concern on Mr. Schlesinger's mind, ...
>
> The first was that in some "improbable" situation, Mr. Nixon or one of his aides might get in touch with some military units directly without going through the usual Pentagon chain of command and order that some action be taken to block the "Constitutional process".
>
> The second was that a genuine national emergency might develop in which American military units might have to be placed on alert or go into action, and Mr. Schlesinger and General Brown wanted to be able publicly to justify the actions . . . .[287]

> Mr. Zion said: "The document came directly from Mr. Agnew's office, and he knows it. We do not hesitate to submit our credibility against his."

N.Y. Times, July 22, 1970, at 23, col. 1. The article reported that Vice President Agnew's substantiation for his denial was that the memorandum was printed on the wrong stationery and the word "confidential" was in the wrong corner. According to Agnew, the memorandum was on stationery used by the previous administration. Mr. Zion's response was "that it was possible Mr. Agnew's office had used the old stationery in the interest of economy." *Id.*

A week later *Scanlan's* placed an ad in the New York Times challenging the Vice President to a test of credibility. N.Y. Times, July 30, 1970, at 34, col. 2. In the same issue, an article reported that Attorney General John Mitchell had indicated that an investigation was being conducted to find the source of the rumor reported in *Scanlan's*. *Id.* at 15, col. 1. In a personal telephone conversation with the author on February 26, 1974, Mr. Zion claimed the investigation was never completed because the study had been verified and that he believed the government had driven him out of business. He also believed that government pressure had been applied to *Scanlan's* printers and distributors in the United States and Canada. The credibility of this information is admittedly questionable, but this Comment is an attempt to illustrate the significance of the problem and not to report the news.

287. N.Y. Times, Aug. 25, 1974, at 6, col. 2-3.

288. *Id.* at 32, col. 3-4. The concern at the time of President Nixon's resignation was largely a reaction to a similar situation occurring ten months earlier during the "Saturday Night Massacre" of October 20, 1973, when the President dismissed Watergate special prosecutor, Archibald Cox, which precipitated the resignation of Attorney General Elliot Richardson and the ouster of his deputy, William D. Ruckelshaus. *Id.* Nixon ordered an emergency alert of all military forces on October 24 and 25, 1973, when it seemed as if the Soviet Union was contemplating sending forces into the Middle East. The public skepti-

> There was not only concern that somebody at the White House might order some unit to act against Congress but also that some official might seek to have some unit oust the President.[288]

The present laws regarding executive use of military power domestically are in an extremely dangerous state. It is the responsibility of all persons in a position to amend this legal crisis, particularly legislators, to decide whether the situation can be ignored. Although the law embraces the Principle of Necessity as the means to preserve democracy, its inability to control the executive once a decision to deploy troops has been made is a dormant beast which, if awakened, would devastate the social values which made our nation worth securing.

Michael T. Foster, '75

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cism shown during the alert worried Mr. Kissinger and Mr. Schlesinger. Mr. Schlesinger decided to remain in Washington during the presidential resignation so that he would be at the center of the Pentagon command. He stated: "In keeping with my statutory responsibilities, I did assure myself that there would be no question about the proper constitutional and legislated chain of command and there never was any question." *Id.*